This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

H. A. Robson.

8½ 990

vol. 2
1891

Stanford 6

4475

THE WESTERN LAW TIMES

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

"We will sell to no man, we will deny no man, or defer right nor justice." —Magna Charta.

VOL. 2.

WINNIPEG, CANADA.

THE WESTERN LAW TIMES PUBLISHING COMPANY.

1891.

L18400

JAN 31 1941

CORRIGENDA.

P. 40, l. 2; for "fourteen years" read "for ten years."
" 56, l. 4; from foot; for "1811" read "1821."
" 58, l. 3; for "Kenon" read "Kerr on."
" 59, l. 3; for "nauseum" read "nauseam."
" 90, l. 25; for "Burnard" read "Bernard."
" 107, l. 5 from foot; for "Lady" read "Baroness."

INDEX.

A

Accounts at Mysore, 106.
Advertisement not in English language, 125.
Advertising Barristers, 21, 59, 86, 102, 117, 124.
Albany, He of, 53, 39, 176.
American Law Register, 107.
Anonymous correspondents, 201.
Articles, Leading—
  The Sheriffs of Assiniboia, 1–10, 181–7.
  Review of Manitoba Legislation, 33.
  Recorder Adam Thom, 71.
  Comments on our Constitution, 73.
  The Disbarring of Barristers, 127, 149.
  Some results of the Torrens System, 169.
Assize, A notable, 157.
Assiniboia court forms, 105.
Assiniboia records, Destruction of, 4, 9.
Assiniboia, Sheriffs of, 1–10, 181–7.
Attorney's retainer, Extent of, 100.
Attorney's, Admission of, 200.
Attorneys-General, The old and new, 58.
Attorneys, Striking off rolls, 182.
Australia, The profession in, 136.
Australian Constitution, Comments on the, 173.
Australian Law Times, The, 87.

B

Baccarat case, The, 99, 115.
Bands, Barristers', 199.
Bar, Brit. Colum., Certain of the, 21.
Bar, Calls to the, 65, 107, 125, 200, 201.
Bar committee, English, 86, 108.
Bar dinner, First annual, 11.
Bar, Leaders of the English, 99, 100.
Barrister, A blind, 201.
Barristers, Advertising, 21, 59, 86, 102, 117, 124.
Barristers' bands, 199.
Barristers, The disbarring of, 129–135, 149–155.
Begbie, Sir Matthew, C. J., 192.
Bench, Interruptions by the, 84, 103.
Benchers of B. C., 20.
Benchers of Manitoba, 60, 66, 188, 200.
Benchers of Manitoba, Power of to call and disbar, 129–35, 149–55.
Betournay, N., 145.
Blackmail? Is this, 20.
Blackmail, Sloan's attempt at, 79.
Blanchard, Sedley, Q. C., 17.
"Boodlers" at Ottawa, 167.
Books at the library, 83, 163.
Brit. Col. Bar, Certain of, 21.
Brit. Col. Benchers, 20.
Buckingham, N. P., 200.
Bunn, Sheriff, John, M. D., 183.

C

Calling to the Bar—See Disbarring of Barristers.
Calls to the Bar, 65, 107, 125, 200, 201.
Calder's case, 23.
Cape Law Journal and ourselves, 101.
Captious critics, 67.
Chancellor, The Lord, 81.
Clarence, Duke of, at Middle Temple, 88.
Clark, T. W., 107.
"Client", meaning of term, 25.
Clitheroe case, The, 13, 53, 90.
Colonies, Legal profession in the, 164.
Cooley, Judge T. M., 147.
Constitution, Comments on our, 73.
Conveyancers, Licensed, 26, 105, 124, 145, 199.
County Court Clerks, 145, 161.
County Court Judges, 86, 114, 137.
Court, Decorum in, 115.
Court forms of Assiniboia, 106.
Criminal evidence, Reforms in, 55.
Criminal statistics, 157, 167, 200.
Critics, Captious, 67.

D

Dawson, Alex., 145.
Day, Mr. Justice, Apology of, 24.
Decorum in Court, 115, 159.
Delays in Supreme Court Judgments, 188.
Dinner, First annual bar, 11.
Disallowance of Prov. Acts, 25.
Disbarring barristers, 129, 35, 149, 55.
Divorce Courts for Canada, 98.
Dorion, Sir Antoine A., 91.

E

Effects of heavy penalties, 64.
Election petition, Marquette, 180.
Eloquence, Forensic, 99.
English decisions, 30, 69, 95, 112.
Evidence, criminal, Reforms in, 55.
Exchequer Court Sittings, 125, 145, 180.
Extradition treaty with Orange Free State, 108.

F

Facetiæ—122.
Fees, high, 17, 18.
Field, D. D., on law reform in U. S., 148.
Forensic eloquence, 99.
Forgery in the Torrens System, 87.
Fort Garry, Description of, 9.
Fraudulent intent, 18.
Freemen of the Columbia, 7.

G

Gibbs v. Messer, 87.
Gordon divorce case, The, 85.
Gowns in the U. S., 162.
Grand Jury, Abolition of, 156, 180.
Green Bag, The, 87.

H

Hallen, G. S., 59.
Harvard Law Review, 88.
Howell, H. M., Q. C., 17.
Hudson's Bay Railway, 25.
Huggard, J. T., 53.
Hutchings, E. F., 21.

I

Illinois records, Preservation of, 180.

Incorporated Law Society, 65.
Inns of Court, Education at the, 125.

J

Judges and Parliament, 137, 161.
Judges, Salaries of, 159.
Judicial Committee of P. C., Habitation of, 121.
Judicial incapacity, 137, 161.
Judicial manners, 165.
Jurors as witnesses, 116.
Justice, An impartial, 197.
Justices of the "Law", 26.

K

Kansas, A disgrace to the bench of, 113.
Kemp, Sheriff, 4.

L

Lacoste, Chief Justice, 146.
Lands, Improper dealing in half-breed, 66.
Law Notes, The, 88.
Law Officer's fees in England, 165.
Law reform in U. S., 148.
Law reports ? What are, 141.
Law reports, Manitoba, 204.
Law Soc. of Brit. Columbia, 20.
" of Manitoba, Benchers of, 60.
Law Soc. of Manitoba, Exams. of, 66.
Law Soc. of Manitoba, Finances of, 17.
Law Soc. of Manitoba, Power of to call and disbar., 129-35, 149-55.
Law Soc. of Manitoba, Proceedings of, 109, 202.
Law Students' Journal, 107.
Law Students' Society, 178,
Legal profession, 61, 66, 82, 164, 194, 199.
Lemon, Andrew, 67, 90.
Library, Catalogue of the, 26.
Library, Lighting of the, 26, 168.
Library, New books at the, 83, 163.
Librarian for Osgoode Hall, 201.
Lincoln as a lawyer, 142.
Lister, J. G., 167.
Lowell, J. R., 146.
Lundy's Lane, His. Soc., 148.

M

Macara, W. E., 169.
Macdonald, Rt. Hon. Sir John A., 89, 147.
Macdonald, Baroness, 107.
Machray, J. A., 107.
Martin, Richard, M.P., 56-7-8.
Martin, Hon. Atty.-Genl., 58.
Mather, J. A., 200.
Maybrick insurance case, 120.
McCaul, J. A., 125.
McDonnell, Sheriff, 1-4.
McKenny, Sheriff, 185-6.
McLean, Alex., Sheriff, 126.
McPhillips, A. E., 146, 167.
Mhlakwapalwa at a Circuit Court, 41 *et seq*,
Middle Temple, Grand day at the, 24, 67, 88.
Milltown, Earl of, 25.
Mysore, Selling accounts in, 106.

N

New Jersey Lawyers and Stamp Act, 116.

O

Obituary—
Dorion, Sir Antoine, 90.
Lemon, Andrew, 90.

Obituary—Contd.
Macdonald, Sir John, 89.
McLean, Sheriff, 126.
Thomson, A. W., 126.
Orange Free State, Treaty with, 108.
Osgoode Hall, *Green Bag* on, 87.

P

Parliament and Judges, 137, 161.
Pearson, E. W., 200.
Pegley, C. E., Q.C., 168.
Penalties, Heavy, 64.
Petitions to Parliament, 66.
Petitions to Parliament, Action for refusing to present, 147.
Police Court of Winnipeg, 200.
Portrait of C. J. Taylor, 25.
Prayer, An unique, 179.
Prideaux, Sir W. S., 87.
Prince of Wales at Middle Temple, 24, 67.
Privy Council—See Judicial Committee.
Privy Council, Judgments, Secrecy in, 192.

Q

Queen's Printer, The, 88, 108.

R

Raikes, Rt. Hon. Cecil, 146.
Real Property Act—See Torrens Act.
Records of Assiniboia, Destruction of the, 4, 9.
Redpath, W. S., 118.
Red River Bar Assoc., 194.
Reviews—
Burbridge's Digest of Criminal Law, 27.
Widdifield on Costs, 27.
Reports of Exchequer Court, 28.
Reviews—Contd.
The *Surrogate*, 29.
Smythe's Bills of Exchange Act, 67.
Huston's Constitutional Documents, 91.
Bligh & Todd's Index to Statutes, 92.
Howland's New Empire, 92.
McGuire's Handbook for Magistrates, 108.
Beauchamp's Privy Council, 111.
Madras Law Journal, 163.
McPhillips' Inaugural Address, 167.
Revised Statutes, The, 66.
"Roll of illustrious advertisers", 117.
Ross family, Particulars of, 181, *et seq.*
Ross, Alex., Sheriff, 4, *et seq.*, 181-2-3.
Ross, James, Sheriff, 182-3-4.
Ross, Wm., Sheriff, 10, 181-2-3.
Ross, Wm. R., 200.
Ryan, His Hon. Judge, 200.

S

Salaries of our Judges, 159.
Sayer's case, 23.
School case, The, 87, 274, 189.
Schultz, Hon. Gov. 167, 185.
Semple, Gov. Robert, 2.
Sheriffs of Assiniboia, 1-10, 181-7.
Sheriff Armstrong, 186.
" Bunn, 103.
" Clement, 186.
" Inkster, 186.
" Kemp, 4.
" McDonnell, 1-4.
" McKenny, 185-6.
" McLean, 187.
" McRobbie, 187.
" Ross, Alex., 4, *et seq.*, 181-2-3.

Sheriff Ross, Wm., 10, 181-2-3.
" " James, 102-3-4.
" Setter, 186-7.
" Sutherland, 186.
Sifton, Hon. Atty.-Genl., 58.
Simpson, Sir Geo., 7, 8.
Sloan's "little game", 79.
Smith, R. M., 65.
Smith, J. O., 200.
Solicitor's clerk, an old, 146.
Stephen, Mr. Justice, 25.
Stephens v. McArthur, 18, 188.
Stoakes, Henry, old solicitor's clerk, 146.
Strait's Law Journal, 147.
Supreme Court judgments, 88, 188.
Sutherland, Sheriff, 186.

T

Tax sale deeds, 60.
Taylor, Chief Justice, 25, 65, 157, 168, 187.
Taylor, H. C., 200.
Tennyson, Bertram, 125.
Thom, Recorder, 72.
" " Portrait of—See frontispiece.
Thompson, Sir John, 26.
Thomson, A. W., 126.
Torrens Act, Effect of forgery on, 87.
Torrens System, Some results of, 169-74.
Touting—See advertising.
Travelling editor, A, 139, 176.

U

Unique prayer, An, 179.

V

Vacation, The long, 97, 113.

W

Watson, Rob., M.P., Election petition, 180.
Webster, Sir Richard, 34.
"Why-Why", Mr. Connoly on, 51.
Wicksteed, Geo. W., Q. C., 13.
Wife, Sale of a sale, 122.
William, G.-C., That, 143.
Wills, *N. J. Law Journal* on, 146.
Witnesses, Jurors as, 116.
Woolsack, A shot at the, 81.
Women at the Bar, 65, 128, 168.
Wright, Mr. Justice, Manners of, 165.

THE

WESTERN LAW TIMES.

VOL. II. APRIL, 1891. No. 1.

The Sheriffs of Assiniboia.

PAPER II.

At the conclusion of our first paper we left the second Sheriff of Assiniboia, Mr. Alexander McDonnell, in charge of the dispersed colonists of the Red River Settlement at Jack River House, now Norway House, in the end of June or beginning of July, 1816. It will be remembered that he had been bailed by the North-West Coy. to appear at Montreal, on September 1, if required. It does not appear that he went to Montreal, as we find him in charge of the colonists in July, 1817 at the Forks, for Mr. Commissioner Coltman states in his report (*a*) that he was there at that date, and "in charge of the colony." At the time of his arrest by the Nor'-Westers the year before, he had been required to take an oath that he would never return to the Red River, nor those under his charge, but had positively refused to do so. (*b*) In the early part of the year, January 10, Fort Douglas had been retaken by an armed force of the Earl of Selkirk, commanded by Captain D'Orsonnens, accompanied by Miles MacDonnell, one Alexander McDonnell or McDonald,—whom Mr. Coltman, in his report, (*c*) describes as "late of the Glengary

(*a*) Report, 1819, p. 195.
(*b*) *Ibid.*, p. 201.
(*c*) *Ibid.*, p. 233.

regiment,"—and Mr. William Laidlaw. It is not by any means certain that this was the same man as the Sheriff, though it is but very reasonable to suppose that he was, as no other Alexander McDonnell is referred to except the North-West Coy's partner of that name, and the mere difference of spelling is a matter of small moment, as can be seen at a glance at the various ways this name is spelled in different documents of that period. However that may be, Sheriff McDonnell succeeded the lamented Mr. Semple in the administration of affairs in Red River.(*d*) In fact, according to Ross (*e*) he had succeeded Captain Miles MacDonnell as governor of Assiniboia. This would be possible as Mr. Semple held the much greater office of Governor-in-Chief of Rupert's Land, (*f*) and McDonnell might have held the position of Governor of Assiniboia, though it is not very probable. Ross states "Mr. Alexander McDonnell was Governor (of the colony) from August, 1815, to June, 1822—6 years and 10 months; but the colony was broken up in June, 1815, and the settlers did not return till the summer of 1817." What little that can now be learned of the official actions of the new Governor is not much to his credit. Ross (*g*) thus speaks of him:

"Governor Alexander McDonnell, whom the people in derision nicknamed the 'grasshopper governor,' because he proved as great a destroyer within doors as the grasshoppers in the fields, prided himself in affecting the style of an Indian viceroy. The officials he kept about him resembled the court of an eastern nabob, with its warriors, serfs and valets, and the names they bore were hardly less pompous, for here were secretaries, assistant secretaries,

(*d*) Gunn's *History of Manitoba*, 1880, p. 152.

(*e*) Ross' *Red River Settlement*, 1856, p. 410.

(*f*) Hargrave in his *Red River*, 1871, p. 83, falls into error when he states that "this high office was instituted immediately after the coalition of 1821." See the Resolutions of the General Court of May 19, 1815, *ante*, First Paper, pp. 154 and 159, vol. 1.

(*g*) Red River, 84.

accountants, orderlies, grooms, cooks and butlers. This array of attendants about the little man was supposed to lend a sort of dignity to his position; but his court, like many another where show and folly have usurped the place of wisdom and usefulness, was little more than one prolonged scene of debauchery. From the time the puncheons of rum reached the colony in the fall till they were all drunk dry, nothing was to be seen or heard about Fort Douglas but balling, (*sic*), dancing, rioting and drunkenness, in the barbarous spirit of these disorderly times. . . . . Such was the condition of affairs when Mr. Halkett, one of Lord Selkirk's executors, and a staunch friend to the colony, arrived from England; to whom, therefore, the Scotch settlers formally applied for redress. The viceroy and his satellites were now called to account; all the debts were reduced one-fifth, and the five per cent. added yearly was struck off as a fraudulent and illegal transaction." Mr. Halkett also discovered large quantities of secreted stores and "the iniquity of the system that had been carried on was placed beyond question, and, with this discovery, the last year of Governor McDonnell's stewardship was brought to a close. That worthy, however, took ample revenge on the Scotch settlers by destroying or carrying off all the papers, whether public or private, that had been entrusted to him. Among the documents thus lost to the colonists, for ever, were all the papers containing promises made to them, at different times, by Lord Selkirk, in consideration of their hardships, and other public documents of value."

It is but fair, however, to give the following extract by Mr. Gunn (*h*) before closing this notice of Alexander McDonnell, whose subsequent life we have not thought it desirable to investigate.

"During those six years (of office) the colony had been

(*h*) *History of Manitoba*, p. 221.

assailed by human hostility and by the ravages of the locusts to such an extent that no material progress had been made; yet, who will venture to say that Mr. McDonnell was not entitled to some credit for having established and maintained peace and order among the various nationalities represented by the people over whom he presided? Captain Bulger, who succeeded Mr. McDonnell, in the summer of 1822, entered on the duties of his new office, and his predecessor retired to his farm."

The ruthless and barbarous destruction of the records of the colony, by Governor McDonnell, prevents us from ascertaining who suceeded him in the office of sheriff, and the next entry of any kind relating to the shrievalty of Assiniboia we find in Transaction No. 23, of the Historical Society of Manitoba. On page 5, this entry occurs under a list of documents, produced and read by Mr. C. N. Bell, but which cannot now be found and which were never the property of the society:

"Appointment of Wm. Kempt, (*i*) the first sheriff, Oct. 21st, 1823."

This is erroneous, of course, in stating that Wm. Kempt was the first sheriff. It is *possible* he may have been the third. This document, we are informed by Mr. Bell, was burned in the autumn of last year as were all the other documents read by him that night, Jan. 17, 1889. None of the histories of Manitoba, or other sources of information, contain any further mention of this sheriff, and he apparently took no active part in the affairs of the colony, so we may dismiss him without further notice.

The next holder of the office, so far as is known, was Alexander Ross, a name which is linked with the history of the Red River Settlement, as he has the honour of being its first and most reliable historian.

(*i*) We are informed that this name is "Kemp" and that it is so entered on H. B. Co's. books in London.

This gentleman, in many respects remarkable, was born in Nairnshire, Scotland, on May 9, 1783. He went to Canada when a young man, and was in Upper Canada at the time of Mr. Astor's formation of his great enterprise, the Pacific Fur Company, in the spring of 1810. At the request of Mr. McKay, one of the partners, formerly of the North-West Company, he went to Montreal and engaged as a clerk, with promotion guaranteed in three instead of five years, as in the case of other clerks with one exception. He sailed on September 6, 1810, from New York, in the ship *Tonquin*, with the rest of the adventurers, and it was not till the 25th of March following that they anchored safely in Baker's Bay, within the bar of the Columbia River, in crossing which they experienced the greatest dangers and lost several lives. Mr. Ross continued in the service of the Pacific Fur Company till it was sold on the 16th October, 1813, to the North-West Company. "The whole of the goods on hand," he says (*j*) "both at Astoria and throughout the interior, were handed over to the North-West Company, at 10 per cent. on cost and charges. The furs were valued at so much per skin. The whole sales amounted to $80,500, McTavish giving bills of exchange on the agents for the amount, payable in Canada." In the short time the Company was in existance, no less than 61 lives had been lost in the operation of Mr. Astor's ill-starred enterprise.(*k*)

Those who are desirous of obtaining a fuller knowledge of the life of Ross and his companions on the far side of mountains should read his *Adventures of the first settlers on the Oregon and Columbia River*, published in London in 1849; the preface to which is dated Aug. 1, 1846, at Red River Settlement. It is a work of excep-

(*j*) *Adventures on the Columbia*, 1849, p. 253. The actual delivery of possession did not take place till Nov. 12; p. 254.

(*k*) *Ibid.*, p. 283.

tional interest, well written and of great historical value, and is now, comparatively speaking, rare. On the third of April, 1814, Ross formally entered the service of the North-West Company, as did also Messrs. M'Lennan and Ross Cox, and proceeded to resume his former charge at "Oakinacken." (*l*) On the coalition of the Hudson Bay and North-West Companies in 1821, he continued his services in the same regions, and thus was one of the few men who had served successively in all three of the great fur companies which succeeded each other in the Columbia district. In the autumn of 1823 he was offered the appointment, though but a clerk, to the hazardous command of the dangerous Snake country for three years, with "a liberal salary." Having, however, made up his mind to leave the service, he accepted the offer but for one year only. Mr. Ross has told the story of his life in the service of the North-West and Hudson Bay Companies down to the year 1825, in his *Fur Hunters of the Far West; a narrative of adventures in the Oregon and Rocky Mountains.* This work was published in two volumes in London, in 1855, and is one of the best written, most instructive and entertaining accounts of life in the wilderness that we have ever read. It was received in England with deserved praise, and is undoubtedly a standard work on that special subject, and is not now readily obtainable.

He left Flathead House early in the spring and arrived at Spokane House on April 12, 1825, where he met Governor, afterwards Sir George Simpson, for the first time, "he being then on his way across the mountains for Rupert's Land. I made known to him my determination to leave the Columbia, and my intention of going to Red River settlement to see that place. On mentioning Red River, the Governor observed to me, 'If you are resolved on leaving the service and going to Red River, I shall leave

(*l*) *Ibid.*, p. 276.

a situation there for you until you have time to look about you.' I thanked His Excellency for the offer, and prepared for my journey." (*m*)

On arriving at Norway House he relates (*n*) that the Governor sent for him after the public business of the Council was over, and urged him to return to his former pursuits, promising him "the entire management of the Company's affairs in the Snake country, guaranteed . . . for a certain number of years with a liberal salary." On Ross' refusing the offer, chiefly on account of the education of his children, "after a short pause, the Governor observed, '. . . What can I do for you?' I answered, 'Your Excellency has always been a friend to me, and if you are still disposed to add another favour to those I have already received, grant me a spot of land in Red River that I can call my own, and I shall be very thankful.' 'Your request shall be granted,' said he, 'and the Company, in consideration of your exertions and success in the Snake country, are disposed to add something to it.' On this occasion I had every reason to be satisfied. He sent for the chief accountant, and ordered him to draw up a deed for a hundred acres of land, free of all expense, which he signed, handed to me, and we parted."

We have mentioned these particulars because this generous action of Governor Simpson's is in such strong contrast to certain harsh and unjust expressions concerning Ross, used by him in a dispatch to the Governor and Committee in London, dated March 10, 1825, written from Fort George, Columbia River, from a copy of which we quote.

In paragraph 36, referring to the Freemen of the Columbia and Snake country he says: "This band of Freemen, the very scum of the country and generally out-casts from the service for misconduct, are (*sic*) the most unruly

(*m*) The *Fur Hunters of the Far West*, p 159.
(*n*) *Ibid.*, p. 232.

and troublesome gang to deal with in this or any other part of the world, are under no control and feel their own independence, they therefore require very superior management to make anything of them; but I regret to find that Mr. Ross is deficient in that talent and that his presence among them last season had neither the effect of controuling nor directing them. . . . . This important office should not, in my opinion, be left to a self-sufficient, empty-headed man like Ross, who feels no further interest therein than in so far as it secures to him a salary of £120 per annum, and whose reports are so full of bombast and marvellous nonsense that it is impossible to get at any information that can be depended on from him. . . . To Mr. Ross I offered the situation (*o*) of Missionary School Master at the Red River Colony, by consent of the Revd. Mr. Jones, (for which he is well qualified) and I presume he will accompany me out this spring." This hasty, and indeed severe condemnation the Governor doubtless regretted when he came to know the subject of it better, and had discovered his good qualities; later, he made ample and generous amends therefor.

Ross arrived at the settlement in the beginning of July, 1825, and the following remarks as to his impressions of the then Fort Garry, before it was rebuilt, are sufficiently interesting. He says, (*p*) "Instead of a place walled and fortified, as I had expected, I saw nothing but a few wooden houses huddled together without palisades, or any regard to taste or even comfort. To this cluster of huts were, however, appended two long bastions in the same style as the other buildings. These buildings, according to the custom of the country, were used as dwellings and

(*o*) Ross does not state what the position was which he was offered, nor could we imagine what it was till we came upon the above quotation in wading through this voluminous and lengthy dispatch.

(*p*) *Ibid.*, p. 261.

warehouses for carrying on the trade of the place. Nor was the governor's residence anything more in its outward appearance than the cottage of an humble farmer, who might be able to spend fifty pounds a year. These, however, were evidences of the settled and tranquil state of the country."

His wife and children reached the Rocky Mountains that autumn and wintered on the height of land, joining him at Red River in the summer of 1826.

Owing to there being no public records (*q*) in this country dating back prior to Nov. 21, 1844, it is impossible to tell what was the date of his appointment as sheriff. Whatever it was, when the Council of Assiniboia was convened at Upper Fort Garry, on February 12, 1835, Ross was then Sheriff of Assiniboia and also councillor, and as such took his seat at the council table.

The entry of the first case in the earliest volume of the Quarterly Court Records, Nov. 21, 1844, shows that he was present and a member of the board over which Mr. Alexander Christie, Governor of Assiniboia, presided, and sad to relate for the morals of the colony, this first case, *Smith* v. *Kirton*, was an action *crim. con.* Verdict for plaintiff, £30.

Nor was he only sheriff, but also collector of Duties, for in the Quarterly Court Records under date Feb. 18, 1847,

(*q*) The Records of the General Quarterly Court are here referred to. They open at the above date. There must have been records at least since the arrival of the Recorder in the spring of 1839, but they are not in the Legislative Library with the rest, and we can find no trace of them. The Records of the Government of Assiniboia are in a worse state. Though the council was instituted in 1835, no Minute Books can be found prior to March 14, 1861, and one solitary volume, in the same library, is the meagre material for the historian to work on. Where are these missing Minute Books and Records? It is possible that they are in the Hudson's Bay House, London. If so, the H. B. Co. should, as a matter of duty and justice, hand them over to the present Government of Manitoba, and also all other public papers in their possession, now that all their claims on or to this country have been paid and satisfied.

we find that in such capacity he prosecuted one Joseph Robert, who "being accused of having given in false statements of his imports from the United States last Autumn . . . admitted the charge and was fined twenty pounds, which he accordingly paid in Court." He retained the shrievalty for many years, filling the office with efficiency and becoming dignity, somtimes under very adverse circumstances, as witness the report of the celebrated case of *Hudson's Bay Co.* v. *Sayer*, (Decisions p. 12) of which trial he was an eye-witness, and gives a very graphic account thereof on pages 372 *et seq.* of his *Red River Settlement*, published in London, in 1856. (*r*) He was succeeded in his office by his eldest surviving son, William, whose first recorded appearance was at a General Quarterly Court held on Nov. 20, 1851, before this date the father's name occurs, further details of whom and his family are unavoidably held over for our next paper.

(*r*) Preface dated at Red River, June 10, 1852.

DE PRÆSENTI.

FIRST ANNUAL BAR DINNER.

The first annual dinner of the Bar of Manitoba was held at the Clarendon Hotel, in this city, on March 19 ult. We feel sure we are correct in stating that this is the first occasion in Canada of a dinner held by the Bar of a Province exclusively as a bar dinner, and as the beginning of a series of annual dinners. It deserves, as such, more than a passing notice.

The Attorney-General, the Hon. Joseph Martin, was to have presided, but at the last moment was unfortunately summoned to attend a political meeting which had been unexpectedly called by the opposition. Mr. John S. Ewart, Q. C., took the chair in his absence, and Mr. W. E. Perdue the vice-chair. An evening session of the legislature, absence from town, and the illness of a number of the Bar, consequent on the inclemency of the weather, prevented as full an attendance as had been expected, but, nevertheless, about twenty-eight gentlemen sat down to the inaugural dinner which we can conscientiously say was one of the best ever served in Manitoba. The table moreover was very handsomely decorated with a profusion of flowers.

A telegram of regret was read from the Attorney-General, and letters from Mr. T. Mayne Daly, Q. C., M. P., Mr. T. S. Kennedy, Q. C., Mr. Smith Curtis, Mr. W. C. Hunter, Mr. D. Forrester, Mr. J. O'Reilly and Mr. A. V. McCleneghan.

After the dinner the toast of "The Queen" was proposed by the chairman and replied to with the customary three cheers and the singing of the National Anthem.

The toast of "Our Country" was replied to by Mr. Isaac Campbell, Q. C.; that of "The Federal and Provincial Parliaments" by Messrs. Hugh J. Macdonald, Q. C., M. P., and Mr. John MacBeth, ex-M. P. P.; that of "Bench and Bar" by Messrs. Frank S. Nugent and T. G. Mathers; that of "The Ladies" by Mr. A. E. McPhillips; and that of "The Legal Press" by Mr. Archer Martin. At the special request of the chairman and gentlemen present, speeches were also delivered by Messrs. J. B. McLaren, Robert Cassidy and J. T. Huggard. The proceedings were enlivened by songs from the following gentlemen: Mr. G. F. Brophy, "The Red White and Blue"; Mr. Nugent, "Our Home"; and Mr. Archer Martin, "Killaloe."

In conclusion, a few happy remarks were made by the chairman and vice-chairman which were heartily received. Both of these gentlemen pointed out the advantages which would result from a yearly convivial meeting of the Bar in the future, and referred to the success which had, on this occasion, crowned the efforts of the committee.

After singing "Auld Lang Syne," the party broke up in the early morning.

It is not out of place to bestow a word of praise on the tastefully gotten up *menu* which was specially unique and handsome.

The committee desire us publicly to express their thanks to the following members of the Bar who, though unavoidably absent, yet heartily approved of and encouraged their efforts by generously contributing towards the expenses of the dinner: Messrs. Aikins, Q. C., Kennedy, Q. C., Clifford Sifton, Munson, Hough, C. P. Wilson, Prendergast, Jameson, Vivian, Heap (Selkirk), Mickle (Birtle), Colin H. Campbell, Robarts, Davis, Elliott, Andrews, O. H. Clark, R. M. Thomson, Machray, Arthur Clark.

We regret to state that owing to an unfortunate error

the name of Mr. Ewart was omitted from the committee, † given on page 230, Vol. I, and we particularly regret this mistake as the success of the dinner, we understand, was in a great measure owing to the graceful manner in which Mr. Ewart presided at the dinner, most ably assisted by Mr. Perdue. One of the members of the committee has handed us a congratulatory letter on the event, received by him from a gentleman well-known to the Bar and people of Canada. We refer to Mr. Geo. W. Wicksteed, Q. C., of Ottawa, who has so long and ably filled the responsible position of Law Clerk to the House of Commons and has now attained the patriarchal distinction of being in his ninety-second year, and is, so far as we know, the oldest barrister in Canada.

We reproduce some of his remarks by permission, considering them to be very timely and appropriate:

" . . . . I am indebted to you for a copy of the charming *menu* and toasts of the dinner of your Bar at the Clarendon. It must have been delightful, and I am proud of Manitoba and Winnipeg for having done so capital a thing. Many thanks to you, and congratulations to you and your Bar on so famous an event. It will not be 21 years until May next since I revised and signed the office copies (English and French) of the Act constituting your Province, and here we have the Bar giving a dinner and drinking toasts such as Ottawa has never done yet and, for that matter, any other Province, so far as I know. You have come to years of discretion and the stature of a Province before reaching the age of 21. Bravo Manitoba!"

THE CLITHEROE CASE.

After a careful reading of the report of the case of *Ex parte Emily Jackson* in the *Times Law Reports*, March

† The Hon. Attorney-General, Messrs. Aikins, Q. C., Ewart, Q. C., Kennedy, Q. C., Haggart, Perdue, Howard, Baker, McPhillips and Archer Martin, (Hon. Sec.-Treas.)

15 ult., vol. vii, p. 382, we have arrived at the same opinion that has been reached by so many of our contemporaries, that this case has been decided on erroneous principles by a prejudiced and obstinate Bench which appears to have quite made up its mind beforehand to decide in favor of the lady. Mr. Henn Collins, Q. C., has our sympathy and admiration for the patient way he pluckily endured and combatted the badgering and cross-firing of the Lord Chancellor, ably assisted in this innocent and diverting pastime by the other occupants of the Bench.

We could not but feel a certain amount of wonderment at the virtuous explosions against the unfortunate husband indulged in by the learned Judges, *seriatim*, in giving judgment, and could see no reason in the report of the case for such peppery proceedings. We find the clue to this mystery, however, in the following extract, if correct, taken from p. 367 of the *Solicitors' Journal*:

"A correspondent of the *St. James Gazette* says, "We are all familiar with the presence of assessors in our Law courts. In the Admirality courts, for instance, where the Trinity Masters sit with the Judge to advise him on seamanship and naval technicalities; and the presence of mercantile assessors in questions of mercantile usage has continually been advocated, and has, I believe, been adopted more than once. On Thursday last, in the case of Mrs. Jackson, a further, and doubtless most beneficial, enlargement of the principle was witnessed in the Court of Appeal, where the Court, composed of Lord Halsbury, Lord Esher and Lord Justice Fry, was assisted by three lady assessors who sat on the Bench with the Judges. Apparently they were of much use, as they appeared to be frequently consulted by the two first-named Judges throughout a rather protracted trial. As the case was one dealing with the mutual rights of husbands and wives, there seems a particular propriety in the appearance of lady assessors; and there is little doubt that the decision (which was strikingly adverse to the male sex) must have given them particular satisfaction."

The correspondent may see a "particular propriety" in having ladies on the Bench in a suit between husband and wife, but we trust that we shall not, for a long time to come, be afflicted with another judgment which we like-

wise may term, "with particular propriety," a petticoat one.

Now, consider carefully the consequences of this "petticoat" judgment. They are plainly and fairly illustrated in the same number of the *Solicitors' Journal*, at p. 359, under the title of "Husband and Wife," where the whole case is fully discussed. The paragraph we refer to is as follows:

"* * * * With the practical or social effect of the decision it is not the function of this Journal to deal. But we may be permitted to draw attention to the singular irony of fate which has left it to a Lord Chancellor, whose political, religious and social connections have been hitherto understood to be moulded on those of Lord Eldon, to declare, *for the first time, that, according to British law, a wife is at liberty, immediately after going through the ceremony of marriage in church, to desert her husband, and without any excuse to condemn him to a life of celibacy; that the continuance of the marriage relation is perfectly voluntary, and that a husband may, for no fault of his own, be deprived of a home and the prospect of children to inherit his name.*"

Now, this simply means that eventually the law will have to be so amended that the mere desertion of her husband by a wife shall be a ground for divorce. Truly a lamentable state of affairs in any country, and especially in moral England. The *Law Journal* says: "Perhaps never in the history of judicial decisions has authority been so boldly over-ruled and disregarded," and the *Justice of the Peace* states, "This judgment is certainly equally deficient in legal reasoning."

The *Times*, for March 27, ult.., "cannot but feel that Mr. Jackson has been hardly used by two of his Judges, . . . We very much doubt whether the public will echo those denunciations of 'brutality' of which Lord Esher was so prodigal."

We see by the *Times* (Weekly) Apr. 3, that since the return of Mrs. Jackson and her relatives to Clitheroe they have met with very disorderly treatment. A tumult occurred on the night of their arrival, and extra constables were put on duty to disperse the noisy crowds which

gathered nightly in front of their house to forcibly express their disapprobation. A fund has been started to take the case to the House of Lords, of which Mr. Vernon, of Blackburn, is the hon. secretary, and Bishop Cramer Roberts, the Rev. A. E. Powell, Mr. John Bolton and Mr. Gaine, the town clerk of Blackburn, trustees.

Finally, on March 23, at Clitheroe police court, the charge preferred by Mrs. Baldwin (the sister) against Mr. Jackson and others for assault was dismissed with costs, including counsel fee as well as witness fees. Mrs. Baldwin wished to withdraw the case but Mr. Jackson's counsel insisted that it should go on, with the above result. We are glad to see the way Mr. Jackson is standing manfully to his guns, undeterred by the off-hand vulgarities and blustering threats of the Lord Chancellor and his willing abettors, the two other noble lords.

THE LAW SOCIETY'S FINANCES.

The annual statement of finances for the year 1890 has been issued. It will be seen that the special account has been increased by the further sum of $854.10, and has now reached the very large amount of $21,996.49 lying in the Imperial Bank, and drawing only four per cent. interest. As a set off against this increase of $854.10 there is an over-draft on the general account of $738.41.

We would like to see the accounts of the Society made up hereafter so that the actual revenue and expenditure could be seen at a glance and readily estimated. From the practice followed for some years past this is not easily ascertained, though, of course, the statement is accurate throughout.

We very much regret that another year has gone by without a re-investment of the fund, which should have been accomplished two years ago, in pursuance of the resolutions of the Bar then passed, at double the interest,

and $1600 thus saved to the Society. We understand that this is about to be done. No difficulty need be experienced. It could be done through the Benchers by the appointment of Trustees without special legislation. In so doing we are of the opinion that no sum greater than $20,000 should be reserved, if so much, as a margin is required for contingencies and the unforeseen, and for such expenses as are properly chargeable to capital account; take for instance the English reports furnished to Portage la Prairie last year, $600.00, and the painting of the portrait of Chief Justice Wallbridge, $500.00, or $1100.00 in all.

The sum of $1409.76 was expended in books and reports for the Winnipeg library. This does not include the printing of our own reports or binding, etc. This item was exceptionally large this year as the library had been allowed to fall sadly behind in many respects, but is now being brought up to date and the present year will see a very considerable reduction in this sum. Even if it were at any time found necessary to encroach upon the special fund in order to keep the library up to the required standard, it would be but following out the intention of the creators of the fund itself, for the report of the Fund Committee, Mr. Sedley Blanchard chairman, presented on Feb. 13, 1886, specially considered this phase of the matter in that it decided that the increase of this reserve should be accompanied by "*having a due regard to the purchase of books and the proper maintenance of the library.*" This point has been quite over looked by one or two members of the Society who talk glibly about "keeping the fund intact," and we therefore recommend it to their careful consideration in the future, as any attempt to increase the fees now paid will probably be the signal for a general raid on the fund which we desire to avert.

By the way, we think that Mr. Howell is about the only

person we know who has *openly* taken the ground that the fees should be restored to the former high figure. Mr. Howell is not a good champion for this view. He came here and was admitted to the Bar in the days of cheap fees, paying only $90.00 into the Law Society, while those gentlemen who came shortly after him, subsequent to Sep. 10, 1881, found the fees raised, and had to pay $250.00.

It is a startling fact that the briefless barrister called to the Bar one day, has had to pay only some thirty dollars less than has Mr. Howell during the whole twelve years he has been at the Bar of this Province, not to speak of reports to the value of $45.00 which he has had free, but the student has not had, or even to refer to the many hundred dollars counsel fees that have been paid Mr. Howell by the Law Society during that time. He can well afford to stand by the high fee system, it has stood by him.

FRAUDULENT INTENT.

In Ontario, as in Manitoba, much trouble has been caused by the efforts of the Legislature in the case of fraudulent conveyances to escape from the refinements of the courts upon the question of intent, and to establish a more definite criterion of the validity of such transactions. In doing this the words "or which has such effect" † have caused general discussion. The Court of Queen's Bench in Manitoba has apparently held that "intent" was not material by virtue of the words above cited. Chief Justice Taylor, in *Stephens* v. *McArthur*, 6 Man., R. 496, at p. 503, said, in referring to the section avoiding fraudulent preferences, that "it was argued that it is still necessary to prove an

†The statute in part reads as follows:

Every gift . . . conveyance or transfer . . . of any goods, chattels or effects . . . made by any person . . . when in insolvent circumstances . . . with intent to defeat, delay, or prejudice his creditors, or to give any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall, as against them be utterly void. Man. 49 Vic. c. 45, sec. 2.

intent to prefer, participated in by both the debtor and the preferred creditor, and that the words 'which has such effect' refer only to this preferring and not to the defeating, delaying or prejudicing;" and after consideration of the various authorities he says, "I cannot, on full consideration of them, come to any other conclusion than that a conveyance which has the effect of delaying, defeating creditors (*sic*)—*quære* 'or prejudicing'—or of preferring one creditor to another, is void equally with one executed with the intent to do so." In other words, the dictum of Osler, J., in *Kennedy* v. *Freeman*, 15 Ont., App. R. 216, cited in the judgment of the learned Chief Justice was apparently approved. The dictum as cited is, "Upon the whole, it appears to me that the plain language of the act calls for the construction I have indicated; for conveyances by an insolvent which have the effect of defeating his creditors seem to be in express terms avoided equally with those which are made with that intent." This would mean that the words "or which has such effect" refer not only to the clause immediately preceding, which relates to the the giving to "any one or more of them a preference over his other creditors or over any one or more of them," but to the antecedent clause relating to intent to defeat, etc. This had the result of holding intent not to be material. The later Ontario cases upon the statute seem to tend in the direction of holding "intent" still to be material. Armour, J., in one case said that although he was inclined to give a different verdict "yet in view of the recent amendment to the statute by the Court of Appeal" he must find for the defendant. But in the brief note of *Molson's Bank* v. *Halter*, 1 W. L. T. 229, the Supreme Court has held that the words "or which has such effect" in the section referred to only apply to tho clause immediately preceding, that is, to the case of giving one or more of the creditors of the transferor a preference over

others, and do not apply to the case of defeating, delaying or prejudicing creditors. This being so, by implication, then "intent" must still be held to be material. We are informed that numerous chattel mortgages have been held in this Province to be void under the authority of *Stephens* v. *McArthur*. That case has been taken to the Supreme Court, has been argued, and now stands for judgment. It therefore appears to us that "intent" is still material and although the case may be sustained in the court above on other grounds, it is over-ruled on this particular point.

LAW SOCIETY OF BRITISH COLUMBIA.

At the election of benchers for the above Law Society, held at Victoria, on March 31 ult., the following gentlemen were elected for the ensuing term :

Hon. A. N. Richards, Q. C.,
James Stewart Yates, Esq.,
D. M. Eberts, Esq.,
Hon. C. E. Pooley, Q. C.,
Eustace Jenns, Esq.,
L. G. McPhillips, Esq.,
Thornton Fell, Esq.

It gives us much pleasure to see the name of Mr. L. G. McPhillips, formerly of the Manitoba bar, on this list, especially after his short residence on the Pacific coast.

IS THIS BLACKMAIL?

We beg to call the attention of the Attorney-General to the following copy of a printed circular which has been handed in to us by a well-known solicitor. This is a most pernicious document, and if it be not actually blackmail—notice well the threat of arrest—it is so near it that the public and the hungry creditor should have the benefit of the decision of the Police Magistrate on the point. The demanding of 50 cents costs, is beyond doubt unlawful. The words in italics are in writing in the original.

FINAL NOTICE

BEFORE PROCEEDING IN THE

DIVISION COURT.

E. F. HUTCHINGS,

—VS.—

FRANK E. GREEN,

Livery, Graham St., City

TAKE NOTICE that unless the sum of *$30* and *55* cents, due from you to *E. F. Hutchings* be paid within *10* days from the date hereof, you shall be proceeded against under the Act; which enacts that, after ten free days, execution pass hereon for the said amount, by arresting and binding, but with certification, that if the Defender agrees to pay by instalments and he or she allows two instalments to run into the third unpaid, then, and in case, the indulgence of paying by instalments shall cease; and ordains execution to pass by the diligence aforesaid, for the whole sum decerned for and unpaid, in terms of the said Act of Parliament.

Dated at *Winnipeg*, this *20th* day of *March*, in the year of our Lord one Thousand Eight Hundred and *Ninety-One*.

EXPENSES.

Original Debt, - -	*27 00*
Interest, - - -	*3 00*
Cost of this application -	*50*
Postage - - -	*5*
Total - -	*30 55*

P. S.—If you prefer settling with *E. F. Hutchings* before going into Court, bring this notice with you and save all further costs.

CERTAIN OF THE BRITISH COLUMBIA BAR.

We hope that every barrister in Canada will read the Vancouver *Daily World* for the 11th instant. It is announced as a special number, and it certainly is, so far as some of the members of the legal fraternity of Vancouver are concerned. Under the heading of "Bench and

Bar," with sub-headings of "The legal disciples of Blackstone include a number of our most brilliant men;" "Who they are," a column and a half is devoted to the praiseworthy motive of endeavouring to bolster up into some sort of prominence certain of the tail of the British Columbia bar. We speak advisedly when we say "tail," as we cannot believe that any member of that bar in good standing, would demean himself and his profession by going in for what, to use a slang phrase, if we may, is best described as a "fake advertising scheme." Do these gentry for one moment imagine that the public does not immediately suspect that all the nauseating compliments which are piled on each of these "gifted ones" are paid for in hard dollars, directly or indirectly, and have their price? One of these, A. St. George Hamersley, among other "fireworks," says he "was called to the bar at Middle Temple, London, in 1874." If so, we hope that this will come to the notice of the Benchers of his Inn. Another worthy, T. Thomson Black, a solicitor from Liverpool, his old friends will be glad to hear, is the best shipping and commercial lawyer in British Columbia. He has also many other captivating and seductive accomplishments which it grieves us to have to pass over in this careless manner. Why do English or Scotch solicitors, when they come out to Canada, rush in such a wild and reckless way into the delights of printer's ink? One would think that they had graduated from the establishment of the Messrs. Pears, they have such really great capabilities in the advertising line. Another "gifted one" has a "bright young legal mind;" another's "ability and learning give him that enviable position in the front rank of the legal fraternity of which he may well be proud," and, most distressing and confusing to relate, every one of the six appears to be unquestionably at the head of the bar of British Columbia, and to be possessed of the most gigantic and top-heavy intellect, and

"Of *that* there is no manner of doubt—
No probable, possible shadow of doubt—
No possible doubt whatever!"

Even the county judge, W. Norman Bole, takes a hand in the game and announces that he is, or was, a Queens Counsel, director of a hospital, Field Marshal of a Field Battery, Rear Admiral of Garrison Artillery and other similar lofty military ranks, * member of the Provincial Parliament, justice of the peace, stipendiary magistrate, promoter of railway schemes, and an entertaining variety of other dignities and offices. He, it appears, not tried but "disposed of" over 600 cases last year; three of his decisions were appealed from, and we are informed that two of these appeals were dismissed but are left in an agony of doubt as to what became of the third.

The following is a full list of these intellectual phenomena who have gained immortality and a place in the waste-paper basket.

W. Norman Bole, A. St. George Hammersley, J. J. Blake, J. A. Russell, John Campbell, E. A. Magee, LL.B., and T. Thomson Black.

The last straw will be found in an advertisement, in another part of the paper, of one John Boultbee who states that he is a "barrister and attorney-at-law of the Provinces of Ontario and Manitoba." He is not. This man was struck off the rolls of the Law Society of this Province by the Court of Queens Bench, and we wonder that he has the impudent effrontery to even refer to his disgraceful career in Manitoba. † The editor of the *World* will, we feel sure, do his duty towards the public in this matter.

CALDER'S CASE AND SAYER'S CASE.

We draw the particular attention of the profession and our readers generally to the reports of these celebrated

* We may be a little confused in these military titles. If we are, we hope the learned judge will accept our apologies.

† *Vide* Manitoba Reports, vol. 6, p. 19, *et seq.*

cases, which we have felt constrained to print in full in this issue. We refer to the former because of the Recorder's very able and exhaustive analysis of the rights of the Hudson's Bay Company, which have attracted so much attention lately, and also because it is the first written judgment ever delivered in the courts of the country that has come down to us; to the latter because of the historical interest with which it is associated, and also to give the official report of a trial concerning which many writers have given free rein to fancy and exaggeration without taking the trouble to ascertain what the parties chiefly interested had to say in the matter. Neither of these cases have been printed before.

BRIEFS.

H. R. H., THE PRINCE OF WALES, dined with the Treasurer and Benchers of the Honorable Society of the Middle Temple on the Grand Day of Easter Term, April 9th instant.

MR. JUSTICE DAY apologized at the conclusion of the Liverpool Assizes, the other day, to the corporation of the city, for some strictures he had passed on the condition of the cells beneath the Court. He found he was in error and had the manliness to publicly acknowledge it from the bench.

THE LAW NOTES mentions the case of a debt collector named George Henry Ealing who was recently fined, at Brentford, Eng., five pounds with costs in each case for having, on two occasions, written demanding payment of debts and stating that he was instructed by his "client" to

take proceedings in default. The Court decided that only a solicitor could use the word "client." The prosecution was instituted by the Incorporated Law Society.

THE SEVENTH Earl of Milltown, who was called to the Irish Bar in 1860, died on March 24 last, at Torquay.

THE BENCHERS have commissioned Mr. Berthon, of Toronto, to paint a full length portrait of the Chief Justice of Manitoba. We wait for the addition of the portrait of our first Chief Justice, the Hon. Alex. Morris, subsequently the Governor of this Province. This matter ought to receive the attention of the governing body without further delay while we have the money on hand.

TWO ACTS of this Province have been disallowed by the Governor-General, on the 4th inst. They were passed on March 31, 1890, and are "An act respecting the diseases of animals," and "An act to authorize companies, institutions or corporations incorporated out of this Province, to transact business therein." At the session of our legislature just over, both acts have been re-enacted with but few alterations; practically none in the latter, to which the Lieut.-Governor has reserved his assent. Now for another conflict with the veto power at Ottawa.

OUR PROVINCIAL LEGISLATURE has just passed an act unanimously granting a bonus of $1,500,000 to the Winnipeg and Hudson Bay Railway and Steamship Company, to be paid on completion of the road. This enterprise, with the strength and high rate of speed now attainable by steamships, we believe to be perfectly feasible.

Pump Court with its customary enterprise has a portrait of Mr. Justice Stephen in the last number we have received. A clever, learned face, but a little harsh and more than determined, almost domineering in fact.

ONE OF THE BEST things we have seen in the *Green Bag* is the portrait and sketch of Sir John S. D. Thompson, the Attorney-General of this Dominion and Minister of Justice. Sir John is a man of great ability and would be an ornament to the bar of any country.

IN THE LAST ISSUE of the *Manitoba Gazette* we notice that John Dupré, of Russell, has been appointed a conveyancer for this Province. We regret to see this appointment as the day for this class of persons is gone past and they are a harmful and irresponsible body. The profession should watch these appointments closely.

IN THE ABOVE number of the *Gazette* we notice that two gentlemen have been appointed "Justices of the *Law* for the Province." What fanciful and absurd creation is this? It must surely be a careless mistake for "Justices of the *Peace.*"

THE LEGISLATURE sat seventeen hours at a stretch a few days ago, the session lasting all night. This is stated to be the longest on record in this Province.

THE NEW GAS REFLECTORS placed in the library have not proved satisfactory. The light is very uncertain and dim, and terribly trying on the eyes, as *habitués* know to their cost.

THE PROFESSION has been a long time expecting the catalogue of the library. This is a real necessity; no time should be lost in its completion.

EASTER TERM commences on May 4 prox.

REVIEWS.

A DIGEST of the Criminal Law of Canada, (Crimes and Punishments) founded by permission on Sir James Fitz-James Stephen's Digest of the Criminal Law. By George Wheelock Burbidge, A. B., D. C. L., Judge of the Exchequer Court of Canada. Toronto: Carswell & Co., 1890.

"This Digest," says the author in the preface, "is intended to be a statement of that part of the Criminal Law of Canada which relates to the definition of crimes and of the punishment prescribed therefor, as it stood on September 1st, 1889." The learned judge has well attained his object and has succeeded in producing a work which, from actual experience, we can say is of great value to the legal profession. It is clear and concise as would naturally follow from the admirable model on which it is founded. One has, however, only to glance at the copious notes by Mr. Justice Burbidge to see that he has carefully and elaborately brought down the English work to the latest decisions in Canada as well as in England, and these notes and references are what constitute the special value of the work. It is hardly necessary at this date to draw further attention to a book which has been so favorably received by the Bar, but we cannot forego mentioning the pleasure and instruction we derived from a careful perusal of chapter 1 on the application of the criminal law of England to the various Canadian colonies. We are not aware of any other work which contains the very valuable information there given. The printer has done his work well, but the binding is indifferent.

A MANUAL on the Taxation of Costs in the High Court of Justice; with chapters on costs in alimony actions, and costs in interpleader proceedings. By Charles Howard Widdifield, of Osgoode Hall, Barrister-at-law. Toronto: Carswell & Co., 1891. 8vo. hf. calf.

This is a slim volume of 182 pp., well printed and handsomely gotten up. We have a grievance at once in

that there is no index, though, to be fair, we have to admit that the necessity for one is to some extent obviated by the plan of the book itself. Had there been one, however, we would have felt inclined to say that Mr. Widdifield had approached perfection in the special method he has followed in dealing with his subject, for in other respects we have nothing but praise for this useful and eminently practical book. The members of the Bar of this Province should not be under the impression that this manual will not be of more than an analagous use to them, for they will find, carefully noted therein, the cases of their own courts down to a very recent date. This is particularly noticeable in the chapter on interpleader costs, which is one of the best in the book, and one that will probably be most consulted here. The first 107 pp. are devoted to costs of actions in general; then follows a chapter on "Costs in Alimony Actions," then "Costs in Interpleader Proceedings," then the "Consolidated Rules Relating to Costs," then Tariff "A" of costs in the High Court of Justice and County Courts, "B," tariff of disbursements, and finally "C," tariff of Sheriffs' and Coroners' fees in civil matters. The work is altogether very complete, and we must congratulate the author on the real success of his labours.

REPORTS of the Exchequer Court of Canada. Charles Morse, LL. B., Barrister-at-law, Reporter. Published under authority by L. A. Audette, LL. B., Advocate, Registrar of the Court. Vol. i. Ottawa: The Queen's Printer, 1891. Cr. 8vo. Paper. $4.00. Also No. 1, of vol. ii, of the same reports.

We extend a hearty welcome to these reports of the Exchequer Court of Canada. The first volume contains all the leading cases hitherto unreported between 1875 and 1887, and also an excellent appendix of short notes of Exchequer cases embodied in the Supreme Court reports. This is an excellent idea affording a ready and convenient

mode of reference which will be much appreciated. Another very commendable feature is the printing of the rules of the court at the back of No. 1 of the second volume. So far as we are able to judge the reporting seems to be very well done, and the statements of facts are above the average in most instances. Many of the judgments themselves are models of clearness and conciseness. We must say that we do not like the expression "Reasons for Judgment" in the margin, as applied to the decision of the court. "Judgment" sounds better and is more correct. This is of course but a small matter, not affecting the general excellence of the system, but still it catches the eye immediately, and with not a favorable impression.

The volume presents a handsome appearance, being the same size as, and almost identical in other respects with the Supreme Court reports.

THE SURROGATE. A popular and practical magazine for lawyers, executors, administrators, trustees, guardians, heirs and legatees. Edited by John L. Branch. The Surrogate Publishing Co., 102 Broadway, N. Y. Subscription $2.00 per annum.

We have received the three last numbers of this journal, which began its existence with the New Year.

It announces editorially that few journals have had such great success, but we are disposed to overlook this flourish of trumpets, which is not usually found in the columns of the legal press, as the journal appears to be really well and energetically conducted. The editor is, moreover, quite right in assuming that there is an interesting field for his journal which has not hitherto been encroached upon, and we cordially wish him every success in his venture. Each number that we have seen has contained a portrait and biographical sketch of a surrogate judge. The portraits are well executed and the sketches interesting, but Mr. Branch will not mind our saying that too lavish praise of judges is apt to pall the unprejudiced

reader. The printer has done his work well in the main, though we do not admire the heavy black headings throughout the journal.

Epitome of English Decisions.

BAILOR AND BAILEE—The bailee of goods cannot avail himself of the title of a third person to the goods as a defence to an action of detinue by the bailor, except by further shewing that he is defending the action on behalf of and by the authority of such third person. *Rogers, Sons & Co.*, v. *Lambert & Co.*, '91, 1 Q. B. 318.

CRIMINAL LAW—Extradition—The offence committed by a citizen of a Swiss Canton, at the time of the late rising there and the imprisonment of the Government officers, in shooting a member of such Government during such rising is not an extraditable one, it being "of a political character" within the meaning of "The Extradition Act." *In re Castroni*, '91, 1 Q. B. 149.

COSTS—Taxation—Where in an action for nuisance by vibration and by offensive behaviour, a verdict is found for the defendant on so much of the statement of claim as relates to offensive behaviour, and damages were given to the plaintiff, on the ground of nuisance by vibration, the main point of the plaintiff, and when the judgment directs that the defendant shall be taxed the costs as to the part he succeeded on and that the plaintiff shall have the costs of the rest of the action, with the right of set off; the taxing master did not err in taxing the plaintiff's bill in allowing him one moiety of each item which related to both issues, and also in full the items relating solely to the issue on which he had succeeded, following the same rule in the case of the defendant. *Jenkins* v. *Jackson*, '91, Ch. 89.

HABEAS CORPUS—An appeal will lie in a Habeas Corpus matter where an order has been made directing the issue

of the writ for the further determination of the right to the custody of an infant child. *The Queen* v. *Barnardo*, 91, 1 Q. B. 194.

LANDLORD AND TENANT—A covenant not to sublet without leave, "which would not be arbitrarily withheld" will not be relieved against by a Court of Equity where a sublettting takes place without such leave, even though the tenant be a most desirable one. *Barrow* v. *Isaac & Son*, '91, 1 Ch. 417.

NEGOTIABLE INSTRUMENT—A negotiable instrument payable to bearer is one which, by the custom of trade passes from hand to hand by delivery and, the holder of which, for the time being, if he is a *bona fide* holder for value without notice, has a good title, notwithstanding any defect of title in the person from whom he took it. *Simmons* v. *London Joint Stock Bank*, '91, 1 Ch. 270.

PRODUCTION—Third party—An order for the production of documents in the possession of a third party, which belong to him, will not be made unless the production of them at that moment is a thing to which the parties are entitled for the purposes of justice and the rule does not imply production of such documents at any moment at the request of a litigant. *In re Smith*; *Williams* v. *Frere*, '91, 1 Ch. 323.

PRINCIPAL AND AGENT—Fraud—Where an agent having been bribed, induces his principal to enter into a contract with the person bribing, and the principal loses, the latter has two cumulative remedies; one against the agent for the amount of the bribe and also one against the agent and the person bribing, jointly or severally, for the loss. *Mayor, etc., Seaford* v. *Lever*, '91, 1 Q. B. 169.

PRINCIPAL AND AGENT—Where a principal employs an agent by parol to purchase property, and the agent purchases in his own name with his own money and takes a conveyance to himself and denies the agency the 7th sec. of the Statute of Frauds, still affords a good defence to an action by the principal against the agent seeking a conveyance to himself. *James* v. *Smith*, '91, 1 Ch. 384.

PRACTICE—Staying proceedings—When a stay of execution is refused by the judge at the trial, an application to the Court of Appeal for a stay pending an appeal must be supported by special circumstances; allegations that there has been misdirection, that the verdict or judgment was against the right of evidence or there was no evidence to support the verdict, are not such. *Monk* v. *Bartram*, '91, 1 Q. B. 346.

SECURITY FOR COSTS—Where an unsuccessful party moves for a new trial, the opposite party cannot get security for costs upon the mere ground of the gross poverty of the party moving. *Heckscher* v. *Crosley*, '91, 1 Q. B. 224.

SOLICITOR—Negligence—Where trust funds are improperly invested in breach of the original trust, and also in insufficient security by the advice of a solicitor, member of a firm acting within the scope of his authority as a partner, his firm must be taken to have had knowledge that the security was improper for trustees and, therefore they were implicated in the breach of trust and consequently liable, and the legal representatives of one of the partners are also liable, although a judgment had been recovered against their partner, the wrong doer individually. *Blyth* v. *Fladgate*, '91, 1 Ch. 337.

VENDOR AND PURCHASER—Misleading condition—A condition of sale, not explaining the specific defect intended to be covered and requiring the purchaser to assume certain facts, is not misleading, if the the vendor believes the facts to be true even though the condition it is intended to cover, is a flaw which goes to the root of the title. *In re Sandbach and Edmondson's contract*, '91, 1 Ch. 99.

VOLUNTARY SETTLEMENT—Where a voluntary settlor by a sufficient instrument settles upon trustees for the benefit of third persons, certain mortgage debts, and afterwards receives payment of the same and then dies, the third parties are entitled to administration of the estate as against the administratrix and execution of the trusts as against the trustees. *In re Patrick*; *Bills* v. *Tatham*, '91, 1 Ch. '82.

THE

WESTERN LAW TIMES.

VOL. II. MAY, 1891. No. 2.

Review of Manitoba Legislation for 1891.

Following out the plan adopted last year we propose to confine ourselves to the brief consideration of those measures which are likely to be of practical use to the legal profession. We do not notice statutes affecting education, public works or kindred subjects. Unless otherwise mentioned all acts came into force on April 18th ult.

We desire to draw attention to the dispatch with which advance sheets of the more important enactments were issued to the profession, through the kindness of the Attorney-General's department, and that of the Queen's Printer. Though the Legislature did not adjourn till April 18, yet on the 27th of that month we received the first sixteen pages of advance sheets. The thanks of the profession and the public are due for this great assistance.

CHAP. 1.

By Sec. 3, the sitting of arbitrators appointed under any statute of the Province is reduced from ten to six hours.

By Sec. 4, the Judge is authorized on an application for alteration or cancellation of a plan, to direct a tender, in certain instances, of double the amount of the ascertained premises, even when there are no buildings fit for occupancy on any such lands.

By Sec. 5, the "Act Respecting Petty Trespasses" is made applicable to cases where the land is or is not enclosed, in case the offender has been requested in writing not to trespass thereon, by the owner, tenant or occupant of the same.

By Sec. 15, "The Quieting Titles Act" is repealed, 47 Vic., Cap. 23, saving pending proceedings.

By Sec. 19, any Rural Municipality may, within three months from the coming into force of the Act, issue debentures pursuant to Cap. 50, of 53 Vic., obtaining first the consent of the Lieut.-Governor-in-Council.

By Sec. 21, it shall not be necessary hereafter that special jury cases shall be tried at Assizes, but the trial may be fixed for any date by the Judge making the order for the special jury, and notice of trial may be given for that date so fixed.

Quaere. If the trial be fixed by the Judge in the order what necessity is there for giving any notice at all?

By Sec. 27, Cap. 10, of 50 Vic., is repealed: An Act to amend "The Manitoba Municipal Act, 1886."

By Sec. 29, all plans presented for registration under R. P. Act, where the land affected is in a town or city having a surveyor, must be approved and signed by such surveyor instead ot engineer as formerly.

By Sec. 30, any Attorney or Solicitor can sue for his fees immediately after the services are rendered or performed for which such fees are chargeable, without the formal rendering of a bill therefor prior to the commencing of the action. There is a proviso that nothing shall confine or limit the power at present possessed by the courts of this Province in regard to the revision or taxation of bills of costs.

We are glad to ste that this piece of legislation, advocated by this journal, has passed the House. No professional man will avail himself of its provisions except in

case of urgent need, and then there is no reason why the hard-working lawyer should lose the fruits of his labour, and have to stand by with his "little bill" for one month, and let every one else gobble up the debtor's property before he can set the law in motion.

By Sec. 32, "every gift, grant, conveyance, alienation, assignment or transfer, which by the Imperial Statute passed in the 13th year of Her late Majesty, Queen Elizabeth, chaptered 5, or by Statute of this Province, 49 Victoria, chaptered 45, or by any other Statute which may now or at any time be in force in this Province, relating to conveyances prejudicial to creditors, is declared to be void shall be void (*sic*), as against the lien and charge aforesaid." Amends 48 Vic., Cap. 17, Sec. 111.

By Sec. 33, all civil cases shall be tried by a Judge without a jury, provided that application can be made to a Judge in Chambers to have a jury, in which case the plaintiff in his declaration or replication, and the defendant in his plea or rejoinder shall state that he intends to apply for a jury, which application must be made within six days after issue joined. Proviso in cases of libel and slander. This is just reversing, in theory, the old practice, though as a matter of fact jury notices were struck out with such celerity by the court, that in practical operation there is very little difference.

Unless within two days of the making of an order for a jury the sum of $25 be deposited with the sheriff and a receipt therefor filed with the prothonotary or deputy clerk of the crown and pleas, such order shall have no force or effect. No fee shall be paid in cases of libel or slander.

This last section not retroactive.

By Sec. 34, sections 2, 3 and 4 of Cap. 4, 49 Vic., respecting juries, are repealed.

By Sec. 35, amending 51 Vic., Cap. 29, Sec. 15, "a Judge in Chambers on granting an order for the trial of a

civil case by a jury, and in the case of actions for libel or slander at any time within six days after issue is joined, either at the request of the party applying for the order or of the opposite party or of any party to the action, may order that the issue of fact therein joined, and the damages, shall be tried and assessed by a special jury," etc.

CHAP. 2.

This Act introduces some sweeping and much needed changes in the County Courts Act.

By Sec. 1, each county court must have a seal, and all process issued by the clerk shall be sealed and stamped therewith.

By Sec. 2, a claim "of any kind," for any amount may now be sued or pleaded as a set-off in the county court, provided the excess over two hundred and fifty dollars is abandoned.

By Sec. 3, large discretionary powers are given to the Judges for transferring causes within their districts. Any claim or demand may be pleaded by way of set-off and heard, whether the same arose within the judicial division or not.

By Sec. 6, the Judge has power to order services to be made by others than the bailiff.

By Sec. 7, the Judge is given a like discretion as to fees for services.

By Sec. 10, the scope of Sec. 65, 50 Vic., Cap. 9, is enlarged to include "account money demand, or other liquidated debt or demand not involving a question of damages."

By Sec. 13, Secs. 123 and 124 are repealed and another substituted, the effect of which is that a transcript cannot be issued till after six days from the day of signing judgment, nor can one issue unless the amount of the judgment is over forty dollars.

By Sec. 16, the bailiff must notify party, or attorney, of date of expiring of writ at least twenty days before such expiry.

By Sec. 17, a certificate of judgment may be obtained and registered where the judgment is over forty dollars, instead of one hundred as formerly.

By Sec. 19, damages may be awarded to the plaintiff in replevin.

By Sec. 21, the old sections relating to appeals and rehearing, 243, 234 and 246, which have given such offence and worked so much injustice, are repealed and a new section, 243, with thirteen sub-sections, enacted in lieu therefor.

The results effected are shortly these:

The undignified farce which had to be gone through with by solicitors in applying to the same Judge for a variety of rehearings, new trials, and other annoyances, is no longer possible, and an appeal is taken straight to a single Judge of the Queen's Bench, where the amount in question is $20 or more.

This means, of course, a hearing at a Tuesday Trial.

On the appellant filing, within ten days, an affidavit stating his *bona fide* intention to appeal, proceedings shall be stayed for two weeks, within which time the appellant must file a præcipe with the prothonotary setting out the nature of the application intended to be made, and the grounds therefor. Before filing the præcipe security for costs must be given by paying into the County Court the sum of $25,00, or giving a bond for $50.00, with one sufficient surety, to the clerk of the court. The clerk shall, upon request in writing, transmit all papers, etc., to the Queen's Bench. Within six days after filing præcipe the appellant must likewise file a statement of the order, decision, or judgment, or verdict, and a copy thereof if given in writing, together with the evidence, etc., and for the

purpose shall have access, free of charge, to all records or papers including the Judge's judgment, or decision, and notes of evidence. Where, on the trial of any action in a County Court, the amount in question exceeds $20.00 the evidence shall be taken down in narrative form by the clerk, at the request of either party.

Where the amount exceeds fifty dollars an appeal may be taken to the Full Court.

Very full powers of amendment and discretion are granted, which, if acted upon by the court in a liberal spirit will prevent a repetition of certain regrettable occurances under the old state of affairs.

CHAP. 5.

By Sec. 9, amending 53 Vic., Cap. 53, Sec. 155, "in any proceedings in any court in this Province a deed purporting to be issued pursuant to a sale of lands for arrears of taxes and purporting to be signed by the Reeve and Treasurer of, and sealed with the seal of any municipality, shall be *prima facie* evidence that the sale alleged in said deed was conducted in a fair and open manner, and that there were taxes due and in arrears upon the land described in the said deed at the time of the sale, for which the same could be sold."

Compare the case of *Alloway* v. *Campbell* reported elsewhere in this issue.

CHAP. 6.

An important enactment of thirty sections by which many alterations are made in the Real Property Act. We have not space to consider the changes in detail, as every section should be carefully annotated by the practitioner. We notice, however, that

By Sec. 2, "the expression 'transmission' shall apply to every involuntary change of ownership of land, mortgage or encumbrance."

By Sec. 3, "the personal representative shall have power to dispose of and otherwise deal with all land so vested in him, as if the same were personal property vested in him."

By Sec. 6, in case of a person dying on or after July 1, 1885, his personal representative for the time being shall, in the interpretation of any statute of Manitoba, or in the construction of any instrument to which the deceased was a party, or in which he was interested, be deemed in law his heirs and assigns unless a contrary intention clearly appears.

By Sec. 10, the lodging of an application under Secs. 40 or 57 to be registered as owner under a tax deed, within the time limited for registration of a tax deed, shall have the same effect as registration of the deed itself.

By Sec. 11, increased facilities are given for service of notices in case of intestates with no personal representatives.

By Sec. 22, an owner under the act may transfer to himself jointly with another and an executor or administrator may transfer to himself individually.

By Sec. 23, registration by way of caveat shall have the same effect as to priority as the registration of any instrument under said act, and the D. R. may in his discretion allow withdrawl of caveat at any time and registration of the instrument under which caveator claims in lieu thereof, preserving all priorities.

By Sec. 24, *laches* of certain nature and kind is made a bar to an action against the assurance fund.

By Sec. 28, in addition to the present requirements of affidavits or declarations annexed to instruments dealing with land, it must be proved that the party dealing with the land is "the registered owner or the person entitled to be registered as owner of the land intended to be dealt with by such instrument." This is an impracticable and unnecessary innovation.

By Sec. 29, the District Registrar may accept as final every Patent which has been issued fourteen years or upwards remaining uncancelled, and as to which he has no notice that proceedings have been taken to set same aside; an applicant desiring to take advantage of this section is required to pay an increased insurance fee of one half of one per cent. unless the D. R. direct otherwise.

This clause is probably more far reaching in its consequences than any other relating to titles of land in this Province. We believe it will prove a very beneficial piece of legislation.

CHAP. 7.

This is "The Registry Act," practically a consolidation of the law under the old system with which our readers are already familiar, though there are not a few changes which we must leave to individual research.

The act came into force on May 1, inst.

CHAP. 8.

By Secs. 1 and 2, sales of goods and chattels affect creditors only "from and after the time of filing" the instrument or conveyance.

CHAP. 12.

By Sec. 1, the provisions of the Canadian Summary Convictions Act, etc., shall apply to all prosecutions and proceedings under our statutes, so far as the same are consistent.

By Sec. 2, "An Act respecting Appeals from Convictions and Orders made by Justices of the Peace," 46 and 47 Vic. Cap. 20, is repealed and hereafter all appeals shall be brought under provisions of said Summary Convictions Act. Proviso in case of appeals already commenced.

CHAP. 25.

Authorizes the revision of the statutes of this Province, at which the commissioners are now working.

* Mhlakwapalwa[a] at a Circuit Court

THE NARRATIVE OF AN UNCIVILISED NATIVE (TRANSLATED.)

You ask me, Sir, to relate my experiences at the Circuit Court last week, where I was summoned to appear before the Judge to give evidence in a case against Vamsinya, who was charged with burning the hut of my wife, Nowayiti.

To begin with I must tell you that although "smelling-out"(*b*) is not permitted by Government, we still firmly believe in the existence of witchcraft, and further that the witch-doctor or *Sanuse* has the power of divining those who are guilty of practising it. It is therefore only natural when a person is accused of the offence by the *Sanuse* that the injured party should take steps to punish him. In these days of the Government we find burning the hut is the safest punishment to adopt, and if the guilty party is in the hut at the time so much the better.

In this particular case three of Vamsinya's children had died one after the other at short intervals, and when the *Sanuse* was applied to he accused my wife, Nowayiti,

* This very clever and amusing sketch we have taken from the *Cape Law Journal.* We hope the editor of that Journal will delight his readers with others of a similar kind.—ED. W. L. T.

(*a*) This name literally translated signifies "the day the skin was tanned or dressed," it is a usage amongst what are termed raw natives, or natives who have not come under the conflicting influences of civilisation to receive names suggested by any passing occurrence.—ED.

(*b*) Smelling-out is a ceremony in which supposed witchcraft is believed to be brought home to some person, who is then either killed or banished after being cruelly treated, and his property confiscated by his chief, in territories not subject to a civilized Government.—ED.

of having killed them by means of witchcraft. This was doubtless because some time before Nowayiti had a quarrel with their mother at a beer party given by one Matambeka. Nowayiti's hut was burnt a few nights after; we were both in at the time, and when I rushed out I identified a man I saw running away in the distance as being Vamsinya. The case was, of course, reported to the Magistrate, who, after hearing what we had to say, informed us that it was one of importance, and must be settled by the Judge who was expected shortly in Butterworth. This pleased me greatly, as it made our case more important, and our neighbors would, of course, look upon us as persons of consequence. The case was discussed in all its details every day, and when I related what I knew to friends I met at the different kraals I visited, I would imagine I was before the Judge, and endeavor to deliver my version of the affair in the oratorical manner for which Kreli's great men are so famed. My style was admired by the people, who said that to listen to me reminded them of the olden times when cases were decided by Kreli, and the Gcaleka orators spoke before their Chief. I was overflowing with confidence. The conviction of Vamsinya was so certain to my mind that I did not trouble my head about him. What chiefly concerned me was to make my speech in a creditable manner, so as to excite the envy of the natives who would be assembled in the Court. Before the Gcaleka war I occupied an important position amongst Kreli's Councillors, I have taken an active part in the trial of many cases, and the settlement of important political questions with the Government; I felt pleased, therefore, to think that once again I should be called upon to appear at the big meeting of the Judge to shew what an old Councillor of Hintza's son could do.

As I already stated, this case was the theme of our daily conversation, and a traveller passing through the

kraal would not leave it before we furnished him with full details, commencing from the day when Vamsinya's first child died.

The people in the location were all deeply interested; but the majority supported Vamsinya. Having faith in the *Sanuse*, they firmly believed that he had stated the truth, and looked upon the punishment Vamsinya had attempted to award Nowayiti as being in accordance with the true faith.

After a considerable time intense excitement was caused in our neighborhood by the news that a policeman had arrived with several blue papers which he distributed to people concerned in our case. I awaited his arrival at my kraal with anxiety, and during the course of the evening he arrived. After the usual greetings he produced the blue papers from his pocket, and told us they were letters from the Judge calling us to Butterworth to state what we knew in the matter of Vamsinya. Of course we were all highly delighted; and as we look upon a policeman as a man of importance and authority I killed a goat for his entertainment, and provided him with a liberal quantity of beer. We spent a very pleasant evening, retiring to our mats at a late hour; the policeman having regaled us with the latest news of the District. He left early in the morning, and we spent the day in talking over the news he had told us; several of our friends came over to have it all repeated to them, and, doubtless, also to ascertain whether there was any possibility of their having a small taste of the remains of the goat. As we seldom leave our homes, and few travellers pass our way, it is a great boon when a man from the Office comes amongst us. The policeman told us the Magistrate said we were on no account to fail to wear clothes when attending the Judge's meeting. This caused us some anxiety, as our young men were away at the Gold Fields with all the trowsers of the locality but

three pair; two of which I tried to borrow; one pair for myself and the other for my brother-in-law, Bambela. But to my sorrow I was informed that they had both been retained by Vamsinya's side. I was at my wit's end to know what to do. Fortunately, I have a friend who resides some miles from my kraal, and to him I applied, and after some hesitation he consented to lend me one pair. Bambela obtained a pair from a sweetheart of his sister. I fortunately possessed a pair of boots which had been given to me many years ago by a friend who assisted at the looting of a trader's shop during the last Gcaleka war; they were hard and well smoked, having lived on the roof of my hut for some years, but as I had never worn boots before, it did not occur to me that either age or smoke would in any way affect my comfort. All things considered I came to the conclusion that there was no cause to doubt that my personal get up would be otherwise than creditable to a man of my position.

I was extremely anxious for the trial to come on, as I felt if I once could explain the matter to the Judge, the extermination of Vamsinya and his family from our side of the country would not take long. What made this more desirable was that we did not consider Vamsinya to be a true Gcaleka; he had been brought up by, and lived amongst, the farmers of the Colony for many years, he is a man of canteen habits, and a lover of white man's food. He is neither Gcaleka, Gcaika or a real good Fingoe; but an individual whose parts are made up by a little from each, the combination making him too crafty for us to deal with, the result being that he is obtaining a footing in our neighborhood and assuming an important position amongst us which is highly objectionable.

The day for our departure at last arrived. Vamsinya, I heard, had left the previous day. Having engaged a law agent to take his case for him he went in to see him.

Our case belonged to the Government, so we did not consider it necessary to trouble ourselves about law agents. My party consisted of Nowayiti, her sister Nolente, Bambela, and myself. Nowayiti and her sister carried our clothes, while we men walked in front carrying our blankets suspended to a stick resting on the shoulder, feeling the weight of our importance, and anxious for the time to arrive when we should see Vamsinya carried off to the Butterworth prison by the Fingoe policeman.

When about two miles from Butterworth we sat down under the shade of a thorn tree and commenced to put on our clothes. Bambela soon dressed; he is a spare young man and found no difficulty in getting into his clothes, in which he could have found room for a friend had a necessity arisen for placing him there. But with me it was different. I cannot remember when I last wore European clothes, and I was much exercised at the idea of having to put them on. It took some time to get the trowsers on; all my companions assisted, and I was reduced to a condition of intense moisture, when Bambela announced that they were on enough. So we tied them around the waist with a strip of cotton blanket, and then put on the hat and coat which I had borrowed by the way. Bambela now appeared to brace himself together. He expectorated carefully on his hands and seized the boots; I could see very clearly that the real agony was about to commence. The women seized my leg and held it firmly. Bambela turned his back to me and put one of his legs on each side of mine, caught hold of the boot with both hands, and while I clung desperately to the stem of the thorn tree, he pulled like an ox, until, to our surprise, the waistband of the trowsers broke. The astonishment of the women was great, as they could not understand the connection between the waistband and the boot. Bambela, who is a man of determined character, was not daunted by these troubles,

and assured us it was all right, so the trio once more bent their backs to the boot question, with the result that both were eventually reported to be on. I heaved a deep sigh of relief, and with the assistance of the women managed to get on to my feet. I cannot describe to you my feelings as I stood on the ground in my new garb. I felt like a bird in a snare; the trowsers irritated me beyond measure. But, oh! the boots, they nearly drove me mad. My feet, which had lived a life of freedom until this day, are large and broad, and when they got into these hard boots, which were originally constructed for a white man, it seemed to me as if my feet were being quietly roasted in the fire. I lost my temper, abused the women, cursed Vamsinya, and was about to strike Nolente for not answering me when I spoke to her, when Bambela came to the rescue and suggested that the boots should be taken off and carried by the women; I acted upon this suggestion, and felt greatly relieved.

Next morning, shortly after sunrise, we duly appeared at the Court House, having passed the night at the kraal of a Gcaleka friend, who has for many years resided amongst the Fingoes. He was very hospitable, killing a goat for us, and showing us all the attention he could. We gave him full details of the Vamsinya case, and he sympathised with us, telling us he thought we would have no cause to complain of the Judge. Our friend, living near Butterworth, had already attended the Judge's meetings. He added that the Judges were severe upon men of the Vamsinya class, who, when convicted, were removed to distant convict stations in Tembuland, where they are effectually banished from their friends. I was glad to hear this, as I knew very well if Vamsinya was sent to some distant prison it would be a great calamity to his friends, and there would be every probability of my being able to persecute them until they should decide to leave

the District. I experienced some difficulty in dressing before starting for the Court, but as my host is a man accustomed to European clothes he rendered valuable assistance, facilitating the boot troubles with an application of lard, thus enabling us to reach the Office without a mishap. We found a few Fingoe policemen about the Court, and they told us the Judge was not due for some time; so I went with Bambela to some thorn-trees near at hand, took off my trowsers and boots, and enjoyed a comforting smoke. After some time I noticed a commotion at the Court House, and presently a vehicle with two prancing horses drove up to the side entrance. I was very much struck with the horses, I had never seen such fine animals before, the horses in my neighbourhood being very small, and there are not many of them. I marvelled at the wonderful animals of the white man, and fattened my eyes upon them.

We hurried over to the Court, and after being worried by the Fingoe policeman, instructed by a white man, who spoke to us in English and appeared surprised at our not understanding him, we settled down quietly under the walls of the building and watched the people with much interest as they came ont and went into the Court. I longed to see the inside of the building, I had never seen such a large one before; my experience of houses consisting of our huts and the small shops of the traders in our neighbourhood. Butterworth appeared to me to be a large town with many beautiful houses, of which the Court House is the most beautiful, and while I sat against it I could see it was the great place of the chief of the white man.

I attempted to repeat to myself the speech I intended to make, but did not feel able to do so in my usual form, there were so many people walking about, talking, calling out, and causing so much bustle and excitement—such as

is never seen at our Gcaleka meetings when cases are being decided—that I became confused, and I imagined I was being bewitched by Vamsinya. Now I must tell you that all of us who can afford it are provided with a medicine (c) which is supposed to bring good luck, and preserve the family from misfortune; and in cases such as the one in which we were engaged the medicine (piece of root) is kept in the mouth and carfully chewed while the case is going on. When I found that my thoughts were wandering I experienced grave doubts as to the quality of our medicine; and serious thoughts that Vamsinya had employed a doctor to deprive me of my senses filled my mind.

Presently there was a movement amongst the police, Vamsinya was marched into the Court by two policemen, and my name was called out in a loud, angry tone. I walked up to the Court House steps, feeling that the hour of victory had arrived, and that I should soon have the pleasure of witnessing Vamsinya's departure for the distant convict station. I was greatly surprised when I entered the Court-room to notice how large it was, the roof appeared so high that it hurt my neck to look at it; the people inside seemed smaller than usual, and were distributed about in so many places and nooks (*amagumbi*), their voices sounded so peculiar and strange to one accustomed only to the open air, that I became confused and felt as if I were in another world. The boarded floor puzzled me, when I put my foot down it come in contact with the floor with a loud noise which sounded throughout the room, and again when I attempted to lift it up it would cling to the floor, and in my endeavours to raise it, I would lift it higher than was necessary, and would find the foot somewhere about the region of the knee, and it would necessarily come down again and cause the same loud noise, which disturbed me

(c) In trials of Native cases witnesses and others are often observed to be chewing all the time the case is proceeding.

and was most trying to my feelings. It was quite clear to me that the boots were the cause of this trouble. I had never, until the previous day, worn a boot during my lifetime before, and they felt heavy and weighed my foot down. However, I saw Vamsinya in a little kraal in the centre of the Court looking at me with a smile, and this made me determined not to falter, but to push bravely forward and vanquish my enemy. I was pushed about from one place to another until I found myself in a small box (*mkumbi*) raised above the level of the floor. I was surrounded by white people of all shapes and sizes. I could see Vamsinya a short distance off smiling at me in an impertinent and confident manner, and talking occassionaly to a white man just below him; I had no white man to talk to, and I was much annoyed when I saw that Vamsinya had one. Opposite to me was a nice-looking old gentleman who spoke Kafir. Below on my left were four or five white men sitting at a table, who were dressed in clothes which hung over their backs, and reminded me of the *mtika* worn by the Gcalekas in ancient times; these men appeared to be the Councillors of their Chief, the Judge, and were apparently eloquent, fearless men, who spoke in confident tones, as if they were well versed in public matters. They inspired me with admiration. But what I was most struck with was the judge. Was he human? Did he eat? Had he arms? Did he ever take off his clothes? Was he standing or sitting? Could he see that I was standing there? were thoughts that rushed through my mind. He appeared to move occassionally on the right side, and that was the only sign of life I could preceive. His eyes were pink, and appeared to look at nothing, he had peculiar hair, such as I have only once before seen upon a white man, and he had glass over his eyes. His coat was most magnificient, and I thought I was in the presence of a spirit; I was appalled, never be-

fore had I seen such a sight. But I felt assured that here was one who was far above being influenced to unfairness for one side or the other.

There was a dead silence, and I began seriously to realize the awkardness of my position. The silence for a few seconds was so great that I could actually hear my hair growing. And oh! those boots of the Gcaleka war, how they did bite, my feet felt as if they were growing larger every moment, and the trousers made me experience symptoms of an approaching fit. I felt too loose in some places, and in others too tight; my coat was so tight across the chest that I could not breathe; it was clear to me that if something did not soon happen I would die (*qawuka*); and I became firmly impressed with the idea that Vamsinya was the cause of all this by means of his medicines.

The old gentleman who spoke Kafir put up two fingers of his right hand, and told me to speak the truth, so help my God! This I solmnly declared I would do, and when I was about to add that it was against my conscience to deviate from the strict lines of truth when before my chiefs, he told me to cut it short and say so help my God! which I did. I felt proud as I held up my hand and displayed the absence of the first joint of the little finger (*ngqiti*) by which the Fingoes could see that I was a true Gcaleka.

Presently I saw something rising up from the table on my left where the gentlemen with the *mtika* were sitting; he rose as the *Nyushu* (cobra) rises in the grass when disturbed. After the rising was completed, I discovered I was confronted by a human being. He was a grand specimen, and it was difficult to believe that he was flesh and blood, everything about the room appeared so unnatural. He was quite as big a man as you find amongst the sons of Kreli; and after looking at me in a supernatural way for some time, commenced to repeat to me what had been said at the Magistrate's Court concerning the burning of

Nowayiti's hut. According to our Gcaleka custom I assented to each sentence with a loud "Ewe!" (*d*) as we always do. No Gcaleka can go on talking to another person unless he receives some reply. He would cease speaking, and say it was no use addressing a deaf and dumb man. So when this long man with the *mtika* spoke to me, I assented in accordance with our custom, notwithstanding that he told me some things which I did not agree to. I answered yes as a sign that I was listening. I presumed, as is always the case in our Gcaleka Courts, he would presently sit down and tell me to go on (*Quba*); then would I thunder forth, in my best style, what I knew, convincing everyone in the Court that I was an orator and councillor of the chief. But it presently appeared such was not to be the case, for, after repeating a few more statements to me, the gentleman in the *mtika* stared at me from under his eyebrows for a few seconds, shewed the whites of his eyes, shrugged his shoulders, said a few words to the judge in a dispairing manner, and sat down. This puzzled me, but what followed puzzled me more. The Judge suddenly appeared to be moving, his face became red, he spoke to the old gentleman, and it was quite clear to me that he was very angry. The old gentleman then addressed me as follows, "The Judge says you are not speaking the truth; you made one statement before the Magistrate and now you make another. You are an old man, and it is correct to presume, as such, you would have more respect for the truth than a boy, but this does not appear to be the case. You are fortunate in escaping a prosecution for false swearing, and a long term of imprisonment. You may go, but consider yourself fortunate at being allowed your freedom." While all this was going on I was thinking of Vamsinya, how fortunate

(*d*) Pronounced *acrwa*, with emphasis on the *a*.

he had been in obtaining such good medicine, and how thoroughly by its use he had overthrown me.

As the old gentleman finished telling me what the Judge had said, I was raised roughly from behind by a white man, and hustled to the Court room door, which I reached after coming violently in contact with several obstructions in the way. It was a great relief to be in the open air once more. I sat on the grass some distance from the door, (taking care not to occupy the place I had before went into the Court, as to do so would bring misfortune upon me and endless litigation before the Chief). After spending some moments in endeavouring to collect my scattered senses, I was astonished to see Vamsinya come swaggering out of the Court room; his eyes glared, and as he inflated his chest he cried out, "*Uvile! Thsotsho! Benditshilo! Kawuve u Vamsinya! Ujobela ohamba nentakakazi. U ntloyiya omantlantla u kozi lwakwa Twetwe umtendezi Wamfengu aholayo!*" (You have felt it! You've got it! I told you so! Listen oh! Vamsinya. The jobela (*e*) that flies with the female birds. The brave hawk and the eagle of the Twetwe [Twetwe forest] and the rescuer of the scattered Fingoes). By these words he glorified himself, and humbled me. I groaned with remorse and considered myself the child of evil fortune. I went to the river, pulled off my clothes, and started for home, miserable and heavy at heart.

So ended my case at the Butterworth Circuit Court. The people told me I lost it because I agreed to statements I knew to be incorrect. I could not help it. I am an old man and I know only of one way of conducting a case, of the new way I am ignorant.

(*e*) The jobela is a little bird commonly known as King of the Six.

DE PRÆSENTI.

A RETIREMENT.

We much regret to announce that our co-editor, Mr. J. T. Huggard, has, owing to lack of spare time, been reluctantly compelled to sever, at least temporarily, his connection with this journal. We shall feel his loss very much. We are glad to say, however, that he has kindly offered to assist us in our duties, and in the near future we trust that our subscribers will have the pleasure of reading more of his able contributions to this journal.

HE OF ALBANY.

Our occasionally diverting friend, the scribe of the *Albany Law Journal*, is constantly in a state of warfare with one at least of his contemporaries, pouring out his vials of wrath in a manner almost entertaining till you are accustomed to it. It is in defence of Woman's Rights and the "Shrieking Sisterhood" that he is particularly at home. The Clitheroe Case afforded him a grand opportunity. It is needless to say he took advantage of it. After publishing, as might be expected in this connection, a garbled and inaccurate report of the case taken from the columns of a daily newspaper, he holds a sort of mental "thirst dance," and in this chaotic state of mind writes, on a wrong assumption of law, an article which may be summarized as a rabid attack on Englishmen and the social life of England, arising evidently from that fell disease known as Anglophobia. Now we read this article at the time but did not think it merited notice; besides we held another opinion and wrote on the case as it appeared to us, leaving Him of Albany in the loneliness of the stand he had taken. Unfortunately for us, he was offended at some of

our remarks, and singled us for a rather vicious attack in an article, opening, we much regret to say, with an indecent reference to married life "in chilly Winnipeg," which we will not repeat here, and closing with a shameful charge of general adultery against English husbands, being moreover pleasingly diversified all through by a merry, if scattered, fusilade against things British and Canadian in general. He complains of what he calls "hard words" in our article. We do not think them so, but that may be a matter of opinion. There is no doubt however about such expressions as "The average English husband is a domestic tyrant . . . who can commit adultery at pleasure . . . , and is in the habit of opening her (his wife's) letters when he chooses. The average English wife is a poor, weak-spirited slave, more or less well cared for, who rather admires such treatment."(*a*) "The bishops (English) are in some points the most contemptible men on the face of the earth, and are a stumbling block in the way of national and moral progress," and the English "theory of divorce is the most immoral in Christendom." Mr. Henn Collins, Q. C., is requested to "stop his foolish cackle," and "John Bull" has to "learn the wholesome lesson" that he may not "bully and enslave" his womankind. "The bedroom tyranny" and the "brutal tyranny" of the "adulterous English husband" are enlarged upon *ad absurdum et ad nauseam.*

We owe our readers an apology for even printing such extracts in this journal, but this is what He of Albany would doubtless dignify by the name of argument, with a sublime indifference to the farcical proceedings and gross abuses of the divorce courts of the United States, which have rendered that branch of their administration of justice

(*a*) We humbly beg the pardon of English ladies for being reluctantly compelled to print such an unwarrantable insult offered to them, their modesty, and their virtue, by this self-appointed champion (!)

a reproach to a great nation, and a dark blot upon its social life.

But He of Albany has "a pretty wit." We do not know why he does so, or what it has to do with a law journal, but whenever he refers to this country he, in the fulness of his facetiousness, makes some gay and "chipper" reference to the climate,or the food of the inhabitants. Thus in his last he speaks of "chilly Winnipeg," and a few days ago gleefully remarked that he was pleased to know that our inhabitants lived on other things besides whale-oil and blubber. We presume by the latter reference that he is of opinion that this prairie and inland province, many hundred miles from the sea, borders on Hudson's Bay. Console thyself, thou Witty One, for at least thy geography is not more faulty than thy reasoning. But come confess, O! Merry Scribe, that when, in thy playful, if somewhat vindictive way, thou didst but yesterday broadly insinuate* that one of thy readers who, wearied with thy woeful wit, had cut off his subscription, was a fool, he did at least evince one gleam of sober judgment, in that, refusing to be further jaded with thy anserous ways, he did forswear support to it, thy gifted enterprise.

REFORMS IN CRIMINAL EVIDENCE.

Mr. Cameron, M. P. for Huron, has introduced a bill in the Dominion Parliament to amend the law of evidence in criminal cases, of which we give the first two clauses. The succeeding ones do not relate to evidence of accused persons themselves:

1. Every one accused of any offence shall be a competent witness for himself or herself upon any charge or complaint against him or her, or upon his or her trial for such offence; and the wife or husband, as the case may be, of every such accused person shall be a competent witness for him or her upon such charge or complaint or trial: Provided, that no such person shall be liable to be called as a witness by the prosecutor; but every such witness called and giving evidence on behalf of the accused shall be liable to be cross-examined like any other witness on any

*April 11, 1891.

matter though not arising out of his examination-in-chief: Provided, that so far as the cross-examination relates to the credit of the accused, the justice or justices, or the Court, may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness.

2. In case an accused person tried before a jury does not tender himself or herself as a witness, or become a witness on the trial, no observations shall be allowed to be made at the trial by the prosecutor or by the counsel for the prosecution, as to his or her not so tendering himself or herself as a witness, or not being a witness, nor shall the Judge presiding at the said trial make any observations respecting the same.

To prisoners the consequences of this enactment are nothing short of momentous. To lawyers it is and has been for years a matter of much contention, and grave doubt, as to whether it is in the interests of the accused to allow him to give evidence on his own behalf.

The bill before us is carefully modelled and we do not think any injustice can result from its becoming law. We shall watch with interest the debate in the House, and would like to warn, if possible, those members who may think of opposing it, how great the opposition has been in earlier days, on the part of legislative bodies, to bills which aimed at introducing a state of affairs so just, nay necessitous, that we can with difficulty believe the law was otherwise than it is now. Take but one example. It is almost incredible, but nevertheless true, that it was not till 1836 that prisoners on trial for felony were accorded the *privilege* of counsel! This measure, says May, incorrectly, (*a*) "had first been proposed in 1824 by Mr. George Lamb." As a matter of fact, three years before that date, on February 27, 1811, Mr. Richard Martin, M. P. for Galway, obtained leave to introduce a bill "to permit persons charged with capital crimes to make their defence by counsel," popularly known as the "Capital Crimes Defence Bill." The bill

(*a*) Constitutional Hist. Cap. xviii.

In the same chapter, with equal accuracy, he states that the charter of the Hudson's Bay Company expired in 1859!

met with vigorous opposition (*b*) and was thrown out on its second reading on March 30, by an unenlightened House!

(*b*) *V.* Hansard's Debates under these dates. We give extracts therefrom as they may prove of value to Mr. Cameron on his present motion: "Capital Crimes Defence Bill.]

Mr. *Martin*, of Galway, said, that the motion he had to make was a proposition so self-evident that he had equal difficulty in finding arguments in its favor and against it. It was so reasonable that merely to mention it was sufficient to procure it the strongest support. It was "for leave to bring in a bill to permit persons charged with capital crimes, to make their defence by counsel." The reverse was, in his view, so utterly inconsistent with the benignity of our criminal code; it was so completely unjust to refuse to a prisoner the advantage enjoyed by the Crown, that he would not attempt to argue it. Mr. Justice Blackstone had called it one of the anomalies of the English law, for which be was unable to account. He should move to bring in the bill.

Mr. *Lockhart* said, that there were many valid objections to the measure, and dwelt particularly on the delays that might result in the administration of justice from a change of the existing system. At present the Court was counsel for the prisoner, and he was not aware that within the last century any disadvantage had resulted from the exclusion of prisoners accused of capital crimes from the use of counsel.

Mr. *Martin* maintained that the Court did not act as counsel for prisoners, but remained neutral. He referred to the case of Bellingham, where the Court refused to allow delay for the arrival of witnesses to prove insanity.

Mr. *Nolan* . . . . hoped the House would make no alteration in the most humane system of jurisprudence that ever existed in any country of the world. The subject of the motion had engaged the attention of the Bar. It was unquestionably one that might give rise to a diversity of opinion. But the result of the opinions which he had been able to collect was, that the purposes of justice were best attained under the present system. There was seldom or never a case in which the Judge did not act as counsel for the prisoner.

Leave was given to bring in the bill."

On March 30th Mr. Martin moved the second reading of the bill and spoke strongly in favor of the same, being ably supported by Sir James Mackintosh who illustrated the benefits derived from the statute of William III, allowing counsel in cases of treason, before which the law refused counsel to prisoners in all criminal cases. The motion was opposed by the Solicitor-General, the Attorney-General, and Sir J. Yorke, with the result above stated.

The reasons given by the Solicitor-General for his opposition appear to us now so extraordinary and fallacious that we reproduce some of

THE OLD AND THE NEW ATTORNEYS-GENERAL.

On the 1st May instant the Hon. Joseph Martin resigned the attorney-generalship, owing to pressure of private affairs. With politics this journal has nothing to do. With the administration of justice it has much to do, and in this latter connection we can safely say that the *régime* of the late attorney-general was marked by expedition, ability and impartiality; a state of affairs which gave great satisfaction not only to the legal profession, who came daily in contact with Mr. Martin, but also to the public who experienced the benefit of the same. At no time before in the history of this province has there been an attorney-general who even approached such a good administration. We much regret the loss of a public servant who has left his mark on the legislature of Manitoba in certain measures which will confer great and lasting benefit on the people of this province.

On the 14th inst., Mr. Clifford Sifton, of Brandon, was sworn in as Mr. Martin's successor. He is a young man. This, however, is a "young man's country," and the people of Manitoba wisely judge a man not by his years but by his character and his mental gifts. We think the choice a very happy one and extend our hearty congratulations to the new attorney-general, in the height of whose

---

them. He stated that "he felt great reluctance in opposing the motion; because he had no doubt that the hon. member (for Galway) intended to confer a benefit on those unhappy persons who were charged with capital offences. From his experience in courts of justice he took upon himself to declare that the proposition would operate greatly to the prejudice of those persons. . . . . However salutary that statute (of William III) as affecting the case of high treason, he contended that extending that privilege to all other prisoners would only be a waste of the public time, and would lead to no result favorable to the administration of public justice"!

Sir J. Yorke also objected to the measure on the ground of the time that would be wasted by counsel in his address in defence of the prisoner!

Kenon Blackstone states, p. 517, that the Act of Wm. III, "was opposed by nearly all the judges." Truly the early part of this century was not far removed from barbarism in more respects than one.

principles and abilities the Bar of this province has every confidence.

TOUTING AD NAUSEUM.

We call the attention of the Benchers to the following circular sent to us by a correspondent :

GEO. ST. JOHN HALLEN,
SOLICITOR, NOTARY PUBLIC, &c., &c.
OFFICES:
RUSSELL AND BIRTLE, MAN.

Russell office, at T. N. Huddlestone's, on Wednesdays and Thursdays, as follows:

May, 20th and 21st.
June, 3rd and 4th, also 17th and 18th June.
July, 1st and 2nd, also 22nd and 23rd July.
August, 5th and 6th, also 19th and 20th August.
September, 2nd and 3rd, also 16th and 17th September.
October, 7th and 8th, also 21st and 22nd October.
November, 4th and 5th, also 18th and 19th November.

The above are the 1st and 3rd Wednesdays and Thursdays of each month except in July.

Collections and legal business of every description promptly executed, attends all provincial courts, capias, attachments and seizures made, ejectments and real estate actions brought, institutes insolvency proceedings, fyles claims and attends creditors meetings, winding up and distribution of assets, suits for damages for personal wrongs or damages to property entered, examines titles, searches mortgage records, *sues for maintenance and support between parents and children*, prosecutes and defends in criminal cases in all stages before Justices, Magistrates and the Court of Queen's Bench, takes extra judicial declarations and affidavits for use in any part of the world, draws marriage contracts, wills, leases, mortgages, bill of sale, chattel mortgage, etc., etc., attends and closes up probate matters, manages estates for heirs, collects rents, insurance claims, municipal and school law advised upon.

Fee for "filling up" one form for ordinary deed or mortgage $1.00 each and 50c. for each affidavit and oath.

All charges very low and reasonable (when cash down.)

Over twenty years experience in legal matters.

We have nothing to say in regard to the above beyond that we hesitated some time before we decided to print this circular, as we are ashamed to think that such a thing could occur in the legal profession of Manitoba. On con-

sideration we deem it our duty to let the profession know that there is a man of this stamp on the roll of solicitors of this province.

We remark that this individual announces that he has had "over twenty years experience in legal matters." It is to be regretted that during that time he did not manage to acquire even the slightest inkling of the common decencies of professional life and his duty towards his fellow practitioners. We await the action of the Benchers in this matter.

OFFICERS OF THE LAW SOCIETY.

At a recent meeting of convocation, Mr. Isaac Campbell, Q. C., was elected President of the Law Society, Mr. J. H. D. Munson, Treasurer, and Mr. Alex. Haggart, Secretary. The Benchers have chosen their officers very judiciously. By the way, we would like some of our readers to inform us, if they can, how there comes to be a President of our Law Society when there is no such office in any other Society or Inn that we know of, the chief office being always that of Treasurer, and no President at all. Though, in the case before us, we have an excellent President, yet what is the use of the office any way, and how was it that we are blessed with one contrary to all precedent? Another question we would like to ask. Does the President preside at convocation and have a casting vote merely, or does he vote with the rest of the Benchers on every question that comes up? We understand that there is a doubt on this point. If so, it ought to be settled and a precedent adopted, as the matter is sure to crop up sometime and perhaps cause trouble.

TAX SALE DEEDS.

Owing to the importance of the interests at stake and wide effect of the decision, we give an exceptionally full report of the case of *Alloway* v. *Campbell*. No case lately

decided is nearly as far reaching in its results as this one will be, if upheld on the appeal which has been taken. Till the giving of judgment by the Full Court, which will be doubtless very soon, we refrain from further comment.

FLOTSAM AND JETSAM.

MR. CONNOLY ON "WHY-WHY."

We take the following clever letter from the *Washington Law Reporter* for April 30 last, written by Mr. Theodore Connoly, to the *New York Law Journal* in answer to Mr. Homer Greene's by no means brilliant article, "Can Lawyers be Honest?"

"It was Mr. Andrew Lang, if my memory serves me correctly, who some years ago wrote a story describing the adventures of a certain primeval bore who asked all kinds of questions, in season and out of season, so that he finally acquired the name of Why-Why, and his outraged fellow-citizens, infuriated by his constant questions, put him to a cruel death. (This is not Mr. Lang's version of the facts, but probably is the true one.)

A certain descendant of Why-Why, named Homer Greene, published in the February number of the *North American Review* an article entitled 'Can Lawyers be Honest?'

The peculiarity of the article is that it is almost entirely made up of questions, and, so far as I can discern, comes to no very definite conclusion. It starts from nowhere and finishes nowhere; all of which is very instructive and well worth the 50 cents which it is necessary to

pay for the privilege of studying Mr. Greene's psychological phenomena.

After waiting in vain to have the legal press partially or wholly annihilate this querist, it seems to me that it might be well to point out the fallacy which underlies the entire article.

To begin with, the writer uses the word 'honest' not as descriptive of a quality, the want of which sends the delinquent to Canada or State Prison, but of honesty in its highest sense; in other words, of honour.

The complaint which he makes—or queries, to put it correctly (for he asserts nothing, merely questions)—is, that lawyers do not fulfil their duties to themselves or to their clients, inasmuch as they take and conduct any case, good, bad, or indifferent, regardless of moral considerations.

They do not, in fact, curb the bad inclinations of their clients, and it is with some relief that I gather from the whole article, so far as I gather anything, that lawyers have a most rascally set of clients, who corrupt the morals of their lawyers.

The strange error of the article is that there is imposed upon lawyers the high ethical and moral duty to take on week days the place filled on Sunday by ministers —to assist their clients to walk in the ways of uprightness.

If this were feasable it would be a consummation devoutly to be wished, but, unfortunately, it is not possible.

When a client goes to his lawyer he does not ask him for his advice as to what course is right or wrong; he simply wants him to protect his legal rights, the rights which the law of the land has given to him, and which, whatever may be his motives, are entitled to protection.

When the lawyer does protect those rights he does his whole duty, and it is only when he does more than

this, and resorts to trickery to gain what is literally 'more than the law allows,' that he is open to censure.

If a client who consults a lawyer gets, instead of advice as to his legal rights, a homily on the True, Good, and Beautiful, he is entitled to rebuke that lawyer for his impertinence, and to tell him, as, indeed, our writer suggests, that he himself is the best judge of right or wrong as regards his conduct.

The active practice of the law is a battle, neither more nor less, and only when he so regards it can the lawyer be successful. It should be a fair fight; but it is, after all, a fight and nothing else.

Of course, we remember Brougham's brilliant paradox, in which he said it was the duty of the lawyer to go to all extremities to further the interests of his clients, even though he should involve his country in ruin. But it is hard, sometimes, to take Lord Brougham's utterances seriously, and this is one of the instances.

In fact, when at the dinner given to the eminent French jurist Berryer, Lord Cockburn, in the course of his speech, turned to Brougham and made the famous remark that the lawyer must wield the sword of the soldier and not the dagger of the assassin, it must have been a very unpleasant occasion for the vivacious Brougham.

And this oft-quoted remark of Cockburn's lays down the true rule as to a lawyer's duties.

The truth is, that the man makes the lawyer far more than the lawyer makes the man; that an honest man is an honest lawyer in the highest and best sense, and that a dishonest man makes a most rascally lawyer.

If the writer of the curious article I am now noticing would drop his questions, and tell us once for all upon what theory the lawyer, in the practice of his profession, is called upon to take affirmative and aggressive action for the reformation of his clients, I should be much pleased.

Until he does that, we must act for one side, not for both—act as lawyers, not as arbiters of morals; and this will be the safer course in every event until we can make certain that the attorney on the other side is animated by the writer's noble sentiments.

In the meantime, the article reminds me very much of a certain occasion—just before the last election—when the letter of the Attorney-General, on a disputed point as to the Ballot Law, was read before a meeting.

The reader had got no further than the first two words of the opinion, which were, 'I think,' when somebody interrupted him by saying, violently, 'Thinks! Who cares what he *thinks?* Anybody can *think.* What I want to know is what he *knows.*'

All of which is respectfully submitted."

EFFECTS OF TOO HEAVY PENALTIES.

We take the following example from *Notes and Qudries*, Feb. 28, last:

"A striking instance of how laws are evaded when public sentiment has out-grown them is to be found in the 'Old Bayly' trials of July 16, 1679. Among other cases, it is recorded that 'Susannah Car, for stealing a petticoat of 6d. value, and £5 from Susanna Silby, was brought in Guilty of Felony to the value of 4d.,' thus escaping the death penalty."

And this from the issue of April 18, ult., contributed by Mr. T. Adolphus Trollope:

"I may supplement Mr. H. Halliday Sparling's note (*supra*) on the results of heavy penalties by a story which my father, a barrister, told me some sixty years or more ago. At some assizes, I think in Sussex, a man was tried for stealing from a dwelling house a pair of leather breeches, and was found guilty. When the jury were made to understand that the result of their finding must be a capital sentence, they were horrified and eagerly inquired whether they could withdraw their verdict. No; such a course was inadmissible. The verdict had been duly found and delivered. The clerk of the court, however, found a way out of the *impasse* by suggesting that nothing forbade an addition to the verdict; whereupon the jury forthwith and unanimously added to their finding of 'guilty' the words 'of manslaughter,' this especial crime being selected as one giving to the Judge a wide discretion in the matter of his

sentence. It thus remained on record of the court in question that a man was tried for stealing leather breeches and thereupon found guilty of manslaughter."

BRIEFS.

MR. ROBERT MASSON SMITH was called to the Bar during Easter Term.

WE UNDERSTAND that an application has been made to the Benchers of the Law Society of Upper Canada, by a young lady, Miss Clara Martin, B. A., of Trinity College, Toronto, for admission as a student at law. With no disrespect intended towards the fair sex, we hope the Benchers will refuse the application as we do not think, all things considered, that the legal profession will be benefited by the admission of ladies to its ranks. A similar application was lately refused by the Irish Law Society.

ACCORDING to the *Law Times*, for the 2nd inst., "a really magnificent entertainment was given by the Incorporated Law Society, at their most commodiaus institution in Chancery-lane, on Wednesday. Excellent music was heard in the examination room at 8:30, and at 10:30 dancing followed. The hospitality of the Society was extended to some thousand guests, including distinguished members of the Bench and Bar." Consider carefully this extract, ye that think there is no social side to a lawyer's life, and that, as a body, they should indulge in no gaiety or recreation.

THE CHIEF JUSTICE of Manitoba, some days ago, resumed his seat on the Bench after a not long, but trying illness. We understand his physician has recommended

rest and a change of air, during which he will take advantage of the opportunity, and sit for his portrait in Toronto.

THE NUMBER of petitions presented to Parliament, at Ottawa, is astonishing. On the 12th instant no less than 511 were presented, and hundreds before and since that date! What becomes of this mass of grievances, real and imaginary? The committee on petitions has "our heartfelt sympathy."

THE COMMISSIONERS on the Revision of the Statutes are now at work incorporating the acts of last session. It will be many weeks before their labours will be completed, as they are by no means light. We trust every care will be taken in the preparation of a good index. Without this the labors of the commission will be practically nullified.

WE UNDERSTAND the Benchers intend to raise the standard of the examination for admission to the Law Society. This could easily be done with profit. Much depends on this examination, the future, in fact, of the candidate. It is no kindness to allow an incapable to scramble through and be a drudge in, and discredit to, the profession for the rest of his days.

WE REGRET to say that complaints have been made to us, from quarters that deserve every consideration, that certain members of the profession, who ought to, and do, know better, have been in the habit of dealing in half-breed titles in a manner which, while infringing no rule ot law, is yet highly unprofessional and dishonourable and merits condemnation from the Law Society and the Court. We give fair warning that professional half-breed "claim runners," if it turn out that there really are any such, need expect no mercy from this journal, whatever their apparent respectability may be.

WE ARE GIVEN to understand that one or two of our readers disapproved of our mentioning, in this column last

month, the fact that the Prince of Wales dined at the Middle Temple, not considering this a suitable topic for a law journal to touch on. We simply wish to say that the *Law Times*, *Law Journal*, *Solicitors' Journal*, *Irish Law Times* and other legal periodicals thought it worth while to inform their readers of the fact. We do not wish to appear uncomplimentary, but we think that news which is good enough for the Inns of Court in London, and the King's Inns in Dublin will likewise answer for our too captious critics.

WE ARE ALWAYS glad and willing to receive suggestions founded on good feeling and a desire to further the best interests of the profession and this journal, and have not infrequently acted on them in the past, and propose to do so in the future to our advantage. At the same time we cannot listen to trivial objections, conceived in a petty spirit and fostered by a narrow and carping disposition.

DEATH.

ON THE 19th inst., at his residence, 176 Edmonton Street, Winnipeg, Andrew Lemon, Esq., Barrister-at-law and Registrar in Equity and Clerk of Records and Writs of the Court of Queen's Bench for Manitoba, in the 61st year of his age.

REVIEWS.

THE LAW of Bills of Exchange and Promissory Notes being an annotation of "The Bills of Exchange Act, 1890." By Edward H. Smythe, LL. D., one of Her Majesty's Counsel. Toronto. The J. E. Bryant Company, (Limited.) Cl. 8vo.

This is an eminently practical and useful book of xxxii and 216 pages. It takes up the ninety-seven sec-

tions of the Bills of Exchange Act of 1890, and deals with each *seriatim*, forming thus a valuable complement to that much needed and very beneficial piece of legislation. The note to the first section of the Act is one of the best, if not the best, in the book, as it points out the alterations in the law in Ontario, and so indirectly in other of the Provinces. The introductory remarks will also repay perusal. A book of this nature can only, of course, be tested by practical application, which, so far, we have had no occasion to apply to it. Outside of that, and as far as can be judged by a critical examination, it is all that can be desired, the notes being apt, concise, and to the point.

So far as printing and general make-up are concerned, the book merits more than a passing notice. The binding is neat and strong, and the type is clear and handsome. In short it is the best printed law book that has come under our notice for some time. We hope our Canadian publishers will keep up this standard and not countenance the "cheap and nasty" work the profession in the States is generally afflicted with.

Epitome of English Decisions.

APPRENTICE—Refusal of master to teach—In an action by the guardians of an apprentice against the master for breach of covenant to keep, teach and maintain the apprentice, the defence that the apprentice is an habitual thief is a good defence, he thus by his own wilful act preventing his master from teaching him, by rendering continuance in his service impossible. *Learoyd* v. *Brook* '91, 1 Q. B. 431.

ARBITRATOR—Award—Setting aside—A party to an award moved to set same aside, alleging bribery of the

arbitrator, proved by witnesses to language used by arbitrator, which admissions would fairly lead to a conclusion of such a state of facts. It was held that proof by the evidence *of others* of an admission by the arbitrator is not sufficient to prove misconduct or fraud on his part. In re *Whiteley* and *Roberts Arbitration*, '91, Ch. 558.

BILLS OF EXCHANGE ACT—Words prohibiting transfer of cheque—Where a cheque was drawn by defendant, payable to the order of M., and crossed "account of M., National Bank," and given to M. who endorsed to plaintiffs, they were entitled to recover upon the same as it contained no words prohibiting transfer or indicating an intention that it should not be transferred. *National Bank* v. *Gilke*, '91, 1 Q. B. 435.

CONTRACT—Principal and agent—Defendants agreed to employ plaintiff as their agent, canvasser, and traveller, on conditions that the agency should be determinable by either party at the end of five years, that plaintiff should do his utmost to obtain orders for, and sell the various goods manufactured or sold by defendants, that plaintiff should sell no others, and be remunerated by commission on goods sold. Defendants' premises two years afterwards burnt down and he did not resume business, and thenceforward ceased to employ plaintiff. Held: The plaintiff was entitled to recover damages, the destruction of the defendants premises by fire being no excuse. *Turner* v. *Goldsmith*, '91, 1 Q. B. 545.

HUSBAND AND WIFE—Separate estate—Garnishee order—A husband and wife recovered a verdict for damages, apportioned as £25 for the wife for actual damages and £45 to the husband to recoup him for money expended, and of this sum, £47 yet in the hands of their solicitor, was garnisheed at the suit of a creditor of the husband. Held: That the £25 formed part of the wife's separate estate and was not garnishable. *Beasley* v. *Roney*, '91, 1 Q. B. 509.

LIBEL—Publication—Privilege—Where a letter containing an accusation of obtaining money under false pretences was dictated to a shorthand clerk, who transcribed

same by a type-writing machine, and after being signed was press copied by an office boy, and sent by post to the plaintiffs, addressed to their firm name, in whose office it was opened by a clerk in the ordinary course of business and read by two other clerks, it was held that the same was libellous and not privileged. *Pullman* v. *Hill*, '91, 1 Q. B., 524.

LIMITATION — Commencement of cause of action— Where a plaintiff was surreptitiously and fraudulently deprived of a lease which was pledged to B. and handed over to defendant by B's. trustee in bankruptcy, and the plaintiff many years after the loss demanded the lease from defendant and brought action for detinue and conversion, it was held that the statute commenced to run only from the commencement of the cause of action which was the demand for, and refusal of, the lease. *Meller* v. *Dell*, '91, 1 Q. B. 468.

MASTER AND SERVANT—Liability of master—A manager of a bar in a public house, who, while acting in that capacity, on his own responsibility gave into custody a customer who tendered by mistake a ten-mark gold piece for a half sovereign, is not a person having implied authority to so act, and the master was not liable. *Abrahams* v. *Deakin*, '91, 1 Q. B. 516.

SLANDER—Privilege—A member of a board of guardians making strictures on the conduct of a person which would not be actionable if only the guardians were present, would not be liable to an action for using such language if other persons beside the guardians and ratepayers also were present, including reporters. *Pittard* v. *Oliver*, '91, 1 Q. B. 474.

VERDICT—Setting aside—A verdict of a jury which is "utterly irreconcilable" should be set aside. *Allcock* v. *Hall*, '91, 1 Q. B. 446.

Adam Thom

FIRST RECORDER OF RUPERT'S LAND D.C.L.

BORN AUG. 31 1802 DIED FEB. 21 1890.

THE

WESTERN LAW TIMES.

VOL. II. JUNE, 1891. No. 3.

Recorder Adam Thom.

In our sketch* of the life of this very able man, so inseparably connected with the early history of this country, we expressed a desire to obtain his portrait. We have, we are very glad to say, at last been able to do so, and have had the same reproduced for the benefit of the profession and the public. We can inform our readers that the likeness is a faithful one, chosen for that special reason, and is taken from an amateur photograph of Mr. Thom when "at ease" in his sitting room, and in his 72nd year. We take this opportunity of supplementing the particulars contained in our former notice. Mr. Thom was born at Brechin, Forfardshire, on August 31, 1802, and was the second son (his elder brother, Thomas, dying in infancy) of Andrew Thom, of Leith, by his wife Elizabeth, daughter of the Rev. Thomas Bisset, D.D., St. Andrew's, Minister of Logierait, Perthshire, by a daughter of the Rev. Thomas Tullideph, D. D., Principal of the United Colleges of St. Salvador and St. Leonard, St. Andrew's, 1739–1777, and one of H. M.'s Chaplains, 1751–1777. He married 1st, a daughter of the Rev. George Bisset, A. M., Udny, Aberdeenshire, by whom he had no issue, and 2nd, in 1839, Miss Anne Blachford, by whom (who died Jan.

* Vol. 1, p. 43.

23, 1876) he had two children—a son, Adam Bisset Thom, born August 2, 1843, at Lower Fort Garry, and now living at Galt, Ontario, unmarried, and a daughter, Frances, who died an infant. Mr. Thom's younger brother, John, married 1st, Margaret, sister of the late Hugh Cant, of Galt, and 2nd, Miss Amelia Gardner. John Thom died in Cleveland, Ohio. Adam Thom had two sisters, the elder of whom, Frances, married her cousin, Adam Bisset, of Leith, and died in 1825; the younger married the late Hugh Cant, of Galt, and died in 1879.

On the authority of Mr. Ryerson,† we before stated that Mr. Thom had left Red River in September, 1854, with his wife and two sons, and sailed from York Factory on Oct. 18 of the same year. This latter date should be September 20, and there were not two sons; Mr. Ryerson mistook the eldest son of the late Archdeacon Cowley for a child of Mr. Thom.

It may not be out of place to state that during several of the later years of Mr. Thom's life at Red River, he resided in the beautifully situated residence now known as Bishop's Court, the seat of the Metropolitan of Rupert's Land.

While living in London he wrote "Emmanuel, both the Germ and the Outcome of the Scriptural Alphabets, a Pentaglot Miniature," published by Remington, in 1885, when he was 83 years of age. This, we understand, was his last literary effort: the fantastic product of the decline of a vigorous and powerful intellect.‡

---

† Hudsons' Bay, pp. 62, 106 *et seq.*

‡ We are indebted to Mr. Adam Bisset Thom, above mentioned, for most of these particulars.

Comments on our Constitution.

Many readers must have been wearied by the numerous contrasts drawn between the constitution of the United States and that of the Canadian Federation. This month, however, one of the ablest articles, and perhaps the most interesting to a certain class of readers, is the comparison drawn between the new constitution of the proposed commonwealth of Australia and that of the other English-speaking Federations, the United States and Canada. Sir Charles Dilke, in an article in *The Forum*, for June, on "The Commonwealth of Australia," makes numerous references to Canada.

Some of these the writer proposes to consider. "The constitution of the Australian Commonwealth, as provisionally adopted, does not make Australia one great state such as the Canadian Dominion, but subject to the consent of the Parliament of the various colonies, creates a series of federal statelets more or less loosely attached to one another." Canadian writers would understand this to mean that national unity is to be more definitely obtained in Canada than in the United States, because in the former all general powers are vested, or rather, are to remain vested in the Dominion, save what are expressly granted to local legislatures. In other words, to use the approximate term borrowed from the United States, State Sovereignty is to be vested in the Dominion and not in the provinces or states individually. The rule to contrary has had a material effect in the United States. To suppose that its materiality would be as essential and important when vested in the central authority as when vested in the minor is, it appears, begging the question. The importance of state sovereignty in the United States

was marked when it was discovered to be essential to the central government in its conflicts with the states.

In Canada as yet the question has not arisen into one of importance. But what has arisen combats the effectiveness of any such claim in the difference in the practical working of the constitution. The powers of the Dominion, as enumerated in the British North America Act,—with the exceptions especially of criminal law, divorce, bills of exchange and promissory notes—are mainly those of the United States with the treaty making and other external powers, belonging to an independent nation, left out. Were the Dominion endowed with these powers, the central government would be exercising mainly the same functions as the Federal Government at Washington. The powers of the local legislatures, with the exceptions above referred to, as might be expected in organizations having exclusive jurisdiction over "property and civil rights," are not essentially different in the full extent of their powers from any state in the Union. And there is this to be considered. Of the provincial powers, wide as they are, it has been said: "Within these limits of subjects and areas, the local legislature is supreme and has the same authority as the Imperial Parliament."(*a*) This is the dictum of the Judicial committee of the Privy Council. That being so, how much less then must be the power of the Dominion to override or even coerce a province within these limits. If such be the case, the writer fails to see that much material difference exists between a state sovereign within certain limits, and a province having "the same authority as the Imperial Parliament." It is probably unnecessary to point out that the fiction that the sovereign is the source of all power, and not the people, still permeates English as well as Canadian constitutional law. Australia has proposed that her lieutenant-governors

(*a*) Vol. I. "A Constitutional Limitation," p. 21.

should be elective, not nominated; calls her provinces "states," and one of the houses the "House of Representatives," names giving rise to ideas somewhat foreign to the submissive fiction of royalty as the source of power. We in Canada have preserved the fiction, but practice the contrary; our Australian kindred have expressed the fact. In other words, the boasted central power of the Dominion may, as distinguished from the United States, be very apparent on paper, but grave doubts must exist as to its practical effect.

The debate on the Jesuit Estates Act will show with what reluctance the Dominion ventures to interfere in provincial affairs. Further, the Dominion Government is not so desirous of interfereing with the legislation of powerful provinces like Ontario and Quebec as in some of the minor ones. So much then for the benefits of state sovereignty in the central body instead of in the individual state.

If, then, the commonwealth under the Southern Cross has followed the United States' model, to the writer at least, it seems to be virtually the Canadian one in practical working, although not as laid down on paper in the Confederation Act.

To emphasize this fact one has only to recall the term, "Provincial Rights," so much used in the conflict between Manitoba and the Dominion Government. The term has a ring of state sovereignty about it.

It seems strange to find this distinguished publicist apparently insisting upon the wisdom of making the Australian Supreme Court final, and then, if not, to find this sentiment. "For my part, I should prefer to see the Privy Council receive in its ranks the most distinguished of colonial legists and become a Pan-Britannic Supreme Court. No form of British unity could so strongly tend to keep us one people to the end of Time, one in law as in

race and tongue." These are almost the identical words used in a previous article in this journal.(*b*)

In view of the question that has arisen in New Orleans as to the right of the United States to interfere and compel the State of Louisiana to perform certain treaty obligations, another writer, the well-known author of "The American Commonwealth," points out in a recent article that Great Britain might find herself in the same position, as to some of her colonies, as the United States now is as to this individual state. This could hardly be caused by any of the Canadian provinces. If by the Dominion at large, it would be simply a question of independence. If by one of the provinces, then an express provision in the Confederation Act provides that "the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries."(*c*) So that, unless we expect absolute rebellion by the Dominion, the Imperial Government could call upon it "to enforce treaty obligations in its provinces," and no such question as Mr. Bryce seems to suppose could arise in Canada.

It may not be out of place here to discuss another question of interest. Could it be urged that when a Lieutenant-Governor, contrary to the advice of his ministers, and under instructions from the Dominion Government, reserves his assent to Bills, he is supported by the central idea of state sovereignty in the Dominion as above set out? It appears not. If the local legislature is coextensive with the Imperial Parliament in certain limits, the Dominion Parliament cannot be superior to it. The late case in Ontario, commonly called the "Pardoning Case," defines this

(*b*) "The Canadian Commonwealth." Ante, Vol. I., p. 139.

(*c*) B. N. A. Act, Sec. 131.

more clearly. There it was held that the Lieutenant-Governor could pardon certain local offences of a penal nature. It seems strange, then, that the Dominion Government, a co-ordinate body, should in certain cases instruct the Lieutenant-Governor to reserve assent, especially to measures which the Governor-General has vetoed on the advice of his ministers. But this comes from not distinguishing between the two kinds of veto vested in the Governor-General; that relating to him as an Imperial officer responsible to England, and that of an ordinary governor following the advice of his ministers. It may then be questioned whether the Governor-General in Council can constitutionally veto a measure of a supreme authority, such as the local legislature. Nothing can be added to elucidate this point other than the citation from the despatch of Lord John Russell.(*d*) If then the Governor-General, not of his own motive, as a representative of the sovereign, but as the Governor-General in Council, vetoes a provincial measure upon grounds that would not justify his acting on behalf of his sovereign apart from his council, it is well to consider how far he is justified in doing so.

That these two kinds of vetoes are considered in the B. N. A. Act appears to be arguable, if not plain. (*e*) He,

---

(*d*) The constitution of England has settled into a form of government in which the prerogative of the Crown is undisputed, but is never exercised without advice. . . . . .

It may happen, therefore, that the governor (of a crown colony) receives at one and the same time instructions from the Queen and advice from his Executive Council totally at variance with each other. If he is to obey his instructions from England, the parallel of constitutional responsibility entirely fails (as in the case of the Governor-General-in-Council vetoing an act of a provincial legislature, for his council is not responsible to the people of the province.) If, on the other hand, he is to follow the advice of his council he is no longer a subordinate officer but an independent sovereign. Houston's Constitutional Documents, p. 300.

(*e*) B. N. A. Act, Sec. 12, Sec. 90.

the Governor-General, has all the powers which were vested in the governors of the various provinces prior to confederation which are as far as possible vested in or exercisable by him "with the advice, or with the advice or consent of, or in conjunction with the Queen's Privy Conncil for Canada, or any members thereof, or by the Governor-General individually, *as the case requires*," and the Lieutenant-Governor may reserve his assent for the Governor-General.

This being the case, it cannot be entirely maintained, as Sir Charles apparently thinks, that the Dominion is one great state, and even if he should have wished to see state or provincial rights more strictly defined and more absolutely subordinated to the Australian common government, it should not be supposed that in the Dominion the provinces are so absolutely subordinated. On the contrary, the individuality of the provinces or states may apparently be non-existent, but like many other fictions of existence elsewhere, and of non-existence in British monarchial models, it still remains.(*f*) This paper has somewhat extended beyond the limits the writer intended to place on it, yet in view of the importance of the articles in question, he feels partly justified in attempting to extend in a slight degree, however humble, the knowledge of these valuable comments on our constitution.

J. T. HUGGARD.

(*f*) It seems strange to speak of the Dominion as one great state, and then to turn to the pessimistic view taken of its shattered condition in *Canada and the Canadian Question*, the latest work from the pen of the gifted Oxford professor, Goldwin Smith.

DE PRÆSENTI.

MR. SLOAN'S "LITTLE GAME."

The following account of "the ways that are dark" of Mr. Sloan and his unsuccessful attempt to victimize certain legal firms of the Province of Quebec, will put the fraternity on their guard here. We take the account from the Montreal *Gazette* of June 15th instant.

TACKLED THE WRONG MEN.

SLOAN, THE CINCINNATI BLACKMAILER, DENOUNCED BY THE BAR.

(From our own correspondent.)

QUEBEC, June 13.—Some days ago there appeared in these columns a description of the mode adopted by an American publisher to compel our lawyers to continue their subscriptions to his publication. The matter was taken up at a general meeting of the Bar, and the following resolutions were adopted unanimously :—

Moved by the Hon. F. Langelier, Q. C., and A. H. Cook, Q. C., seconded by J. Malouin, Q. C., and C. Fitzpatrick, and resolved :—

1. That the members of the Bar of this province, section of the district of Quebec, having taken consideration of a circular purporting to be issued by W. H. Sloan, president of the "Continental Collection Union," desire to record our protest against the slanderous charges therein made against most esteemed and respected members of our Bar.

2. That we authorize the officers of this section to take such steps as may be deemed advisable to punish the author of this libellous circular, and we draw the attention of the members of the Bar of this province to the danger to which they are exposed by being connected with such an association.

3. That a copy of the above resolutions be published in the press.

TRIED IT IN MONTREAL.

The following letter shows that Sloan has been trying his game in Montreal, as he doubtless has also in other places :—

To the Editor of the Gazette :

SIR,—We notice in the Quebec correspondence, in your issue of June 10th, that Mr. F. X. Lemieux, M. P. P., barrister, of Quebec, in a recent letter to *L'Electeur*, had complained of the blackmailing efforts of an in-

dividual named W. H. Sloan, of Cincinnati, Ohio, styling himself president of the "Continental Collection Union."

We have had a similar experience with Sloan and, as he appears to make a regular practice of this business, we venture, for the benefit of the profession and the public, to request the publication of the facts in our own case.

In October, 1889, a copy of a useless and unwieldy pamphlet, in which our name appeared, and which bore the title of "Sloan's Legal Directory," was received in our office. We at once requested that no further copies be sent us. No member or employee of our firm has any recollection of having signed any order for this book, or any agreement to take the same. We heard nothing more from Sloan until December, 1890, when we received notice from him that he had drawn a draft on us for five dollars.

We replied that we had discontinued his book and owed him nothing. He again wrote us stating that we had signed a contract to take his book for three years at five dollars per annum, and enclosing a copy of the alleged agreement, which, as we have stated, no one in our office remembered having signed.

We declined to accept his five dollar draft naturally, and his next move was a draft for $10, within a week after the first, accompanied by a letter menacing us with "expulsion" from his so-called "union," and enclosing a copy of a blackmailing and scurrilous circular which he threatened to have published about us if we failed to respond to his appeal for $10. We must say that even according to the terms of his alleged contract, the only sum due was $5. This was clearly pointed out to him, but he still insisted on getting $10, accompanied by threats that if we did not pay it he would expel us. We have requested Sloan to send us the alleged order for inspection, expressing our willingness to pay any sum lawfully due, but this he declined to do, sending us, however, another alleged copy of contract, which varied materially from that first sent us. In view of the frequency of his attempts of a like character, we conclude he has no such document in his possession.

Last January we laid the whole facts and correspondence before a number of our *confreres*, most of whose names had appeared as subscribers to Sloan's directory.

Our attitude in declining to accede to Sloan's extortion and blackmail was approved by the honorable A. Lacoste, Q. C., Messrs. Abbott, Campbell & Meredith; Chapleau, Hall, Nicolls & Brown; Barnard & Barnard; David & Demers; Duhamel, Marceau & Merrill; Maclaren, Leet, Smith & Smith; Atwater & Mackie; Prefontaine, St. Jean & Gouin; Doherty & Doherty; H. A. Hutchings; and James Crankshaw, and his conduct condemned in emphatic terms.

Sloan's last move is to issue an undated circular, similar to that referred to by Mr. Lemiux, in which he assumes to expunge our names from a list of membership of his "union."

As this circular may reach some persons who might attach some importance to it, we venture to explain that it is the last effort of a foiled swindler to blackmail us.

We learn that other legal firms have been threatened with a like fate, and perhaps the knowledge that Sloan is merely an adventurer and deadbeat, who ekes out a precarious existence by *chantage*, may save some of them the annoyance which we have had. The fellow is utterly irresponsible. There is no such thing as a "union." He simply deceives the profession and the public by the pretence that there is anything deserving the name of a "union." As for expulsion—we forbade him two years ago to put our names in his book.

The Bar of Canada, where his operations are chiefly carried on, should be placed on their guard against this unprincipled trickster.

MACMASTER & McGIBBON.

The Temple, Montreal, June 13, 1891.

A SHOT AT THE WOOL-SACK.

The *Solicitors' Journal* for June 6, inst., administers a well deserved rebuke to Lord Halsbury, as appears from the following extract:

The Lord Chancellor has taken an early opportunity of making a graceful return for the recent hospitality of his admirers in the Council Chamber at the Law Institution. Speaking at the Mansion House on Wednesday evening, he took occasion to remark that "people demand that the administration of justice should be carried on with cheapness and promptitude; and these are characteristics about which something may be said on both sides. With regard to cheapness, there is a large, useful and learned body *who are not altogether interested in justice being cheap.* I remember an old lady who was telling me of her grievances against her solicitor. Her grievance was that she was occupied a whole day in pointing out to him the boundaries of his own property, and that he was so dead to all sense of justice as to charge her for what she told him." That is to say, LORD HALSBURY informs the world that the demand that "the administration of justice should be carried on with cheapness" is thwarted by the solicitors, whose interest it is that justice should be dear; and he enforces his moral by retailing an old lady's gossip, with the view of showing the nature of the solicitor to be so rapacious that you cannot even do him a good turn for himself without his charging you for it. Did LORD HALSBURY, we might inquire, exercise his power of cross-examination on his old lady friend, or did he swallow open-mouthed a story which, on the face of it, is difficult of acceptance by persons whose opinions and knowledge of solicitors are not based on the stage harpy of half a century ago? Anyhow, we hope that that old lady and that solicitor will be identified, and that we shall hear, sooner or later, the full facts of the transaction.

It appears to us that when one man partakes of another's hospitality it is scarcely decent to throw dirt at him immediately afterwards, even through the instrumentality of old wives' tales. The Lord Chancellor should bear in mind, the next time he proposes to amuse his present entertainers at the expense of former ones, that the day of Messrs. Dodson & Fogg, and Quirk, Gammon & Snap, of Saffron Hill, has gone by, and that the solicitor of the latter half of the 19th-century is, in many ways, a man of very different class from the attorney of the former half.

STRIKING ATTORNEYS OFF THE ROLLS.

The Chief Justice delivered judgment on the 25th instant adopting the master's report *Re* Roderick Leander Ashbaugh, an attorney, and made the rule absolute striking him off the rolls. The attorney happened also to be a barrister, and the Law Society's rule asked that the defendant be also disbarred and his name removed from the roll of barristers. The Chief Justice regretted that, following the case of *Re John Boultbee*, 6 Man. R. 19, he could not strike him off the barrister's roll, and commented upon this anomaly. At this late moment, just on going to press, we have no opportunity to enter fully into such a state of affairs as we will later, for the Law Society has a duty yet to perform in this notorious matter and further investigations to make, but we may say now that quite apart from any statutory enactment of this Province we are, after a careful consideration of Boultbee's Case and the late case of *Hands* v. *The Law Society of Upper Canada*, of the opinion, that the Judges of Her Majesty's Court of Queen's Bench for Manitoba have ample inherent jurisdiction to disbar any barrister who commits in his capacity of attorney such a grave offence as did John Boultbee. Which one of the judges of the Queens Bench would listen to a disgraced attorney if

he presumed to address the court as a barrister? The Law Society of this Province has gone to a great deal of trouble and expense in the discharge of a very distasteful duty—and has more before it—to vindicate the professional reputation and keep its members free from reproach. Let the Bench now do its duty towards the suitors who stand in the halls of the courts of justice of this Province. We have every confidence that it will.

NEW BOOKS AT THE LIBRARY.

The following works have been added to the Law Society's library:

The "Torrens System" of Transfer of Land. By Herbert C. Jones. Toronto, Carswell & Co., 1886.

A Treatise upon the Law of Extradition. By Sir Edward Clarke, Knt. 3rd ed. London, Stevens and Haynes, 1888.

Documents Illustrative of the Canadian Constitution. By Wm. Houston, M. A., Librarian of the Ontario Legislature. Toronto, Carswell & Co., 1891.

The Canadian Law List, 1891. By H. R. Hardy, Esq. Toronto, Copp, Clark & Co., 1891.

A Handbook for Magistrates in relation to Summary Convictions, etc. By Hon. Thomas H. McGuire, one of the Justices of the Supreme Court of the North-West Territories. Toronto, Carswell & Co., 1890.

A Digest of the Law of Uses and Profits of Land. By Stephen Martin Leake. London, Stevens & Sons, 1888.

History of Trial by Jury. By William Forsyth, M. A. Toronto, Carswell & Co., 1876.

The Practice on the Crown Side of the Queen's Bench Division of Her Majesty's High Court of Justice. By Frederick Hugh Short and Francis Hamilton Miller, Esqs. London, Stevens & Haynes, 1890.

The Dominion Law Index. By Harris H. Bligh, Q. C., and Walter Todd. Toronto, Carswell & Co., 1891.

The Law Relating to Dogs. By Frederick Lupton. London, Stevens & Sons, 1888.

A Treatise on Facts as subjects of enquiry by a jury. By James Ram, Barrister-at-law. Fourth American edition, 1890.

A Commentary on the Interpretation of Statutes. By G. A. Endlich. Jersey City, F. D. Linn & Co., 1888.

A Treatise on the Law of Eminent Domain in the United States. By John Lewis. Chicago, Callaghan & Co., 1888.

American Street Railway Decisions. By Charles A. Richardson and Alfred J. Hook. Brooklyn, The American Street R'y. Association, 1890.

A Treatise on the Law of Railways, etc. By Sir Wm. Hodges, Knt. 7th ed. London, H. Sweet & Sons, 1888.

The Parliamentary and Local Government Registration Manual. Revised edition. By M. Muir MacKenzie and S. G. Lushington. London, Shaw & Sons, 1889.

FLOTSAM AND JETSAM.

SIR RICHARD WEBSTER ON THE BENCH.

We take the following from the *Law Times* for June 6, inst.:

"The Attorney-General, in the course of his reply to the toast of 'The Health of the Legal Profession,' proposed by the Lord Mayor, at the Mansion House, on Wednesday evening, made some remarks on the cross-examination of advocates by the Bench. He said that, reading not many

days ago the speeches of the Attorneys-General in the past, he noticed that to a great extent their arguments were permitted to proceed without interruption. Now, it was very different. A distinguished member of the present Bench said to him not many years ago that the best advocate was no longer the man who prepared the best oration, but he who could best meet the cross-examination of the Bench. Does this sort of thing promote the interests of justice? We doubt it very much indeed."

THE GORDON DIVORCE CASE.

The *Chicago Legal Adviser* for May 16 ult. states that "the Supreme Court of Illinois has entered a decree of disbarment against Charles J. Beattie, thus cancelling his licence to practice law in the courts of the commonwealth. He is the man who, 'on his own responsibility,' delivered a pretended decree of divorce to Mrs. Ada E. Gordon, who, believing it to be genuine, entered unconsciously into the state of bigamy by marrying another man. The decree of the Supreme Court is in all lights commendable as a good beginning of a much needed work of judicial renovation." Mrs. Gordon is, or was, the wife of G. B. Gordon, formerly a solicitor residing in this city.

BRIEFS.

We desire to caution members of the profession against allowing themselves to be led into a legal advertising scheme now on foot in connection with an illustrated descriptive pamphlet of this city, and its attractions, which is being issued, as they may not understand the true nature of the support they are asked to give to the enterprise. We refer them to our article on "Certain of the British Columbia Bar" in our April issue.

The Bar of England has its interests looked after and is represented by sixteen of its members who form a Bar Committee, a thoroughly representative body, eight being Queen's Counsel, and eight from the Outer Bar. They are elected annually, and are duly proposed at the annual meeting. The names of the candidates are printed in the legal press so that all may know beforehand who are desirous of office. The electors are the whole of the Bar. Those who are horrified at any change in our system of voting, or at the idea of the Benchers holding office for less than three years, should bear these facts in mind.

Several of the English law journals, and the press generally, have been drawing attention to the condition and actions of the County Court Judiciary in England, and have been using some plain and vigorous language in that connection, demanding reforms. We propose to follow their example shortly, and throw some side-lights on the administration of justice in certain of the county courts of this province, on the very next complaint that is made to us. We think we owe a duty to the profession and the public, and we intend to perform it.

THE June issue of the *Green Bag* is a very good one and contains an excellent article by D. B. Read, Q. C., on "The Law School of Osgoode Hall," with capital illustrations of Osgoode Hall, Hon. Edward Blake, Q. C., Charles Moss, Q. C., Edward Martin, Q. C., W. A. Reeve, Q. C., E. Douglas Armour, Q. C., and A. H. Marsh, Q. C. The Canadian Bar ought to afford a generous support to the *Green Bag.*

OUR Manitoba School Case came up before the Supreme Court at Ottawa, on May 27. The court was composed of Chief Justice Sir W. J. Ritchie, and Justices Fournier, Strong, Taschereau and Patterson; Judge Gwynne was absent. The matter was argued and stands for judgment. S. H. Blake, Q. C., Ewart, Q. C., and Brophy, appeared for Barrett, appellant, and Joseph Martin, late Attorney-General of this province, and Gormully, Q. C., argued the case on behalf of the respondents, the City of Winnipeg.

WE learn from *The Australian Law Times*, for March 21, last, that in the late case of *Gibbs* (Registrar of Titles) v. *Messer*, an appeal from the Supreme Court of Victoria, the Privy Council has held that, although a forged transfer or mortgage which is void at common law, would, when duly entered on the register, become the root of a valid title in a *bona fide* purchaser by force of the Transfer of Land Statute, yet there is no enactment which renders indefeasible the registered right of the transferee or mortgagee under a null deed.

MR. WALTER SHERBURNE PRIDEAUX, solicitor, of Goldsmith's Hall, Foster-lane, London, E. C., has had the honour of Knighthood conferred upon him by Her Majesty, in recognition of the valuable services rendered by him to Her Majesty's Government on various occasions, and more especially in connection with the recent repeal of the duties upon gold and silver plate.—*Solicitors' Journal.*

THE London *Law Notes* is favouring its readers with a series of amusing and instructive articles called "Interviews with Clients; by a Worldly Solicitor."

THE Supreme Court gave judgment on the 22nd instant in the following Manitoba cases: Morden v. Municipality of South Dufferin, appeal allowed; and Lynch v. North-West Land Company, appeal allowed. Emerson v. Bannerman, a case from the N.-W. Territories, appeal dismissed, Gwynne, J., dissenting. In the Manitoba cases the result is that the tax legislation, imposing an additional 10 per cent. on taxes in arrears, is upheld. Such a charge, it appears, is not interest; it is in the nature of a penalty by way of an additional tax, and therefore within the powers of the provincial legislature. Almost every case that goes from the courts of this province to the Supreme Court is over-ruled. We understand the average is nearly ninety per cent. If reports are to be credited, our school case is to suffer a like fate. Fortunately we still have the Privy Council to rely upon.

THE *Harvard Law Review* for May contains a very able and learned article called "The Older Modes of Trial." The writer, Mr. James B. Thayer, has handled his subject to great advantage.

THE Duke of Clarence and Avondale, who is a Bencher of the Middle Temple, and other distinguished guests, dined with Lord Coleridge (the Treasurer) and the other Benchers, in the hall of that Inn, on the Grand Day of Trinity Term.

IN OUR reference last month to the expedition with which the Queen's Printer got out the statutes of last session, we omitted to state that within nine days after the adjournment of the House we received the file of the statutes complete, and a bound copy shortly afterwards. This is really most praiseworthy. We would like to hear from the Queen's Printers of other Provinces.

OBITUARY.

On Saturday, June 6, inst., at his residence, Earnscliffe, in the city of Ottawa, in his 77th year, died the Right Honorable Sir John Alexander Macdonald, G. C. B., Q. C., Imperial Privy Councillor, and Prime Minister of Canada.

It is unnecessary to give here lengthy details of the brilliant career of this great man, as they are known to every citizen of Canada. Suffice it to say he was born in George street, Glasgow, on Jan. 11, 1815, the son of Hugh Macdonald, and came to Canada with his parents in 1820, settling at Kingston, Ontario. He was called to the Bar of Upper Canada in Hilary Term, 1836, and received his patent of precedence as a Queen's Counsel ten years later.

He was returned for Kingston in the Commons in the Conservative interest at every election, but one, from Nov., 1844, to April, 1891. On the formation of the Dominion of Canada, July 1, 1867, he was called upon to form the first government under the new constitution, and was sworn in as Attorney-General and Minister of Justice, and has been Premier ever since, save the five years in opposition during the McKenzie *régime* from Nov., 1873, to Sept., 1878. He was married twice. 1st, in 1843, to his cousin Isabella, daughter of Alexander Clark, of Dalnavert, Inverness, by whom he had two sons, John Alexander, born in 1847 and died in 1848, and Hugh John, born in 1850, now of this city, Q. C., and M. P. for Winnipeg in the House of Commons; 2nd, in 1867, to Susan Agnes, daughter of Hon. T. J. Bernard, of Jamaica, by whom he has an only child, a daughter.

While the critical historian may not be able to approve of some of the methods adopted by Sir John Macdonald,

there can be no doubt but that his was a master mind, and that he was, beyond all question, the first man in Greater Britain, and one of the most remarkable men of the century. The Bar of Canada, irrespective of politics, can remember with just pride that he was a member of their profession, as is also his successor, the present Prime Minister, the Hon. J. J. C. Abbott, Q. C.

ANDREW LEMON, Esq., Barrister-at-law, Registrar in Equity and Clerk of Records and Writs of the Court of Queen's Bench of this Province, whose death, on May 19, ult., we recorded in our last issue, was a younger son of John Lemon, of Lot 71, Township of Stamford, yeoman, and was there born on Sept. 27, 1830. He was called to the Bar of Upper Canada in Mich. Term, 1852, and enjoyed a large and lucrative practice at Guelph, Ontario, for many years, and was for several years a Bencher of the Law Society of Upper Canada. He came to this city in the early summer of 1882, and was called to the Bar of Manitoba in Easter term of that year, and subsequently received the appointments which he filled till his death.

He married, Aug. 22, 1861, Charlotte Laura, only daughter of Captain George Armstrong, of East Zorra, near Woodstock, by his wife Charlotte Fellows, and by her, who died May 3, 1882, he had three sons and two daughters; George Heaton, Edward Burnard, Laura Gertrude, Charlotte Ethel May and John Andrew Wilford.

The deceased gentleman died at his residence, 176 Edmonton street, and was buried in St. John's churchyard whither a large number of friends followed him to the grave. He died deeply and deservedly regretted, for he was kindly, sympathetic, and benevolent. We know he left a host of friends; we believe he left not one enemy.

SIR ANTOINE A. DORION, late Chief Justice of Quebec, died on May 31st, ult., in his 73rd year. He was Attorney-General of Canada and Minister of Justice in the

MacKenzie (Liberal) administration from 1873-4, in which latter year he was appointed to his late high position. An accomplished orator, an eloquent and learned lawyer, an able parliamentarian, and an upright judge, he earned the respect and confidence of his fellow countrymen. He was, till the last, a close friend of his great opponent in politics, Sir John Macdonald, who died six days after.

REVIEWS.

DOCUMENTS Illustrative of the Canadian Constitution. Edited, with notes and appendices, by William Houston, M. A., Librarian to the Ontario Legislature. Toronto: Carswell & Co. Cl. 8vo.

The author in his preface defines his work to be "the result of an attempt to bring together in a single collection the documents which contain the constitution of the Dominion of Canada and illustrate its development. A much larger number of documents might legitimately have been included under this description, but the line had to be drawn somewhere, and I have chosen to draw it between those that are of international and imperial origin on the one hand, and those that have resulted from the exercise of colonial authority on the other."

Following out these lines the author has been very happy in his selections, and the result of his labors is to provide those interested in Canadian historical and constitutional questions with a handy and extremely useful volume of xxii and 338 pages. The table of contents is lengthy, but among these "milestones of constitutional progress" we notice a Chronological Index—very good;—the Treaty of Utrecht; Representative institutions of the Maritime Provinces, with sub-headings; Capitulation of Quebec;

Capitulation of Montreal; Treaty of Paris, 1763; the Proclamation of 1763; Gov. Murray's commission; Lord Mansfield's judgment in *Campbell* v. *Hall;* Quebec Act, 1774; Constitutional Act, 1791; Union Act, 1840; B. N. A. Act, 1867; Colonial *Habeas Corpus* Act, 1862; Colonial Laws' Validity Act, 1865; Gov.-General's Commissions and Royal Instructions; Treaties relating to Canada; Canadian boundaries; Extradition treaties; Fishery matters; English law introduced into U. C.; Trial by jury in U. C.; Responsible Government; Quebec Resolutions of 1864, and the constitution of the United States.

It is strange to think that the idea of collecting all these various statutes, treaties, and documents together in a form suitable for easy reference has not been before carried out, as it fills at once a gap in Canadian literature. Mr. Houston has added many very valuable notes which facilitate reference and comparison. We trust that the author will continue his labors so auspiciously begun.

The print of the book is clear, but, in our opinion, too fine, and the bright red cloth binding is indifferent and lacks taste.

THE DOMINION LAW INDEX, embracing all the Legislation of the Dominion Parliament, and such Unrepealed Provincial Enactments and Imperial Statutes, Treaties and Orders as bear a Special Relation to Canada, down to and including the Year 1890. By Harris H. Bligh, Q. C., and Walter Todd. Toronto; Carswell & Co. Cl. cr. 8vo.

This is not a hard book for a reviewer to have under his pen. Its usefulness is so apparent that it really needs no recommendation from us. Those unfortunate ones who have often to wade through the statutes looking, for example, for a private act or order in council will give it a hearty and appreciative welcome.

It is a really indispensable book to the busy practitioner; neatly printed and very tastefully bound.

THE NEW EMPIRE. Reflections upon its origin and constitution, and its relations to the Great Republic. By Oliver A. Howland, of Osgoode

Hall, Barrister-at-law. Toronto: Hart & Company, 1891. 8vo., cloth, gilt top, $2.00.

The author has written a valuable contribution to Canadian history and literature. We find a difficulty in doing justice to Mr. Howland's work, as there is necessarily much in it which lies within the area of controversial politics and polemical discussion, matters beyond the province of a legal publication such as this. We regret, therefore, that we will have to confine ourselves almost wholly to "vague generalities" so as not to divulge our own political leanings, which would be quite out of place.

The first thing to strike us in our perusal of the book is the spirit of toleration and consideration of the views of the writer's opponents which prevades it throughout, and we cannot praise such a feature too highly. With pleasure we extract a few lines from the author's remarks on Mr. Goldwin Smith, even though he differs from him on most material points. "Nothing could be more unjust or more inappropriate than the reproach cast at Mr. Goldwin Smith in answer to some of his recent utterances, that he is 'not a Canadian.' However severe his criticisms, or gloomy his forecasts, he has been one of the influences that have helped to build up a character, and hence to ensure a future, for the people of Canada."

The contents consist of—Chapter 1—The Fall of the Old Empire; 2—The Treaty of Partition and its fulfilment; 3—The Constitution of the New Empire; 4—Our Centenary Year; 5—The Crisis of the Empire; and an Appendix.

The author traces, in an easy and agreeable style, the causes of the revolution of the thirteen colonies and their relation to the mother country and what is now Canada. At the end of the first chapter there is an interesting note on the use of the word "Americans." In one part of it he says, with much truth, "Therefore, Canadians, it seems

to me, need not feel aggrieved over a surrender of the terms *Americans* and *America* to the great people to the South; if they find themselves, also, as a people, giving a name to a division of the world, instead of deriving a mere sub-title, from sharing the possession of a mis-named continent." We do not quite agree with the author in his estimation of the restricted extent of the charters of Charles I. We think that of the Hudson Bay Company, the former owners of this country, at least, one exception. This, however, is a matter open to unlimited discussion.

The fourth chapter, "Our Centenary Year," we like the best in the book. It treats in an able, moderate way of the present condition and the future of Canada. It advocates that Canadians should take advantage of the present connection with Great Britain, and rejects both the ideas of annexation and independence, and points out that the former will never be, and that the time has not nearly arrived for a consideration of the latter. At the same time the author hopes that urgent efforts will be made by the Canadian Government to cultivate, as far as possible, intercourse between our neighbors and ourselves, and suggests, with no little force and eloquence, what great results might be expected from an informal conference held at that most beautiful and historic place, Niagara.

We can heartily recommend "The New Empire" to our readers as a work well deserving of their attention, and are right glad to see such a praiseworthy addition to our literature.

We must say a few words in special praise of the publishers' work. The book is an example of really good printing, large, clear and thoroughly well done. There is a fine facsimile of the Royal Proclamation of 1763, and a good map. The binding is in exceedingly good taste. It is no exaggeration to say that the whole get-up would be a credit to the best English or American houses, and

Messrs. Hart & Company can regard their publication with just pride.

Epitome of English Decisions.

ASSIGNMENT OF DEBT—Rights of assignee—Where certain creditors assigned their claims to the plaintiff on the terms that he should recover same and distribute proceeds, it was held that such an agreement was an absolute assignment on which plaintiff could maintain his action. *Comfort* v. *Betts*, '91, 1 Q. B. 737.

"COAL" OR "COKE"—Meaning of—A statute, Met. Streets Act, 1867, s. 15, imposed a penalty for unloading "coal" on footways within certain hours. Such a provision does not extend to "coke." *Re Fletcher* and *Fields*, '91, 1 Q. B. 790.

FORECLOSURE—Order for possession—An order for the delivery of possession of mortgaged property to the mortgagee should contain a description of the property as set forth in the mortgage deed, in order that the writ may be filled up so as to enable the sheriff to identify the property. *Thynne* v. *Sarl*, '91, 2 Ch. 79.

HUSBAND AND WIFE—Control of wife by husband—Where a husband, having obtained a decree for the restoration of conjugal rights, and, being denied access to his wife, took forcible possession of her, it was held that he was not entitled to keep her in confinement in order to enforce restitution. *Queen* v. *Jackson*, '91, 1 Q. B. 671.

LANDLORD AND TENANT—Forcible entry—Plaintiff, on expiration of his tenancy, refused to give up possession. The defendant, being desirous of pulling down the cottage and rebuilding, sent workmen to remove the roof and pull down the house, and, in the course of so doing, portions of the roof unavoidably fell and damaged furniture below

Held, there was no right of action for trespass, and there was no forcible entry. *Jones* v. *Foley*, '91, 1 Q. B. 730.

MANDATORY INJUNCTION—Erection of buildings after notice—Plaintiff served notice of motion for an injunction to prevent defendant interfering with his light and air by building a large house. Before the return of the motion defendant put on a large gang of men and rushed up the wall to a height of 39 feet. The court ordered the wall to be immediately torn down without regard to the result of the trial because of the attempt to anticipate the order of the court. *Daniel* v. *Ferguson*, '91, 2 Ch. 27.

MARRIED WOMAN—Separate estate—Joint contract—Plaintiff recovered judgment on contract against the husband and then commenced another against the wife on same contract and breaches, alleging that the contract had been signed on behalf of both. Held, that the plaintiff having sued the husband as principal could not now sue the wife. *Hoare* v. *Niblet*, '91, 1 Q. B. 781.

SALE OF GOODS—Auctioneer's liability—Where the auctioneer does nothing more than settle the price as between vendor and purchaser and takes his commission, he is not liable as for a conversion should it turn out that the vendor was not entitled to sell. But where he receives the goods into his custody, and, on selling them, hands them over to the purchasers with a view of passing property he is liable. *Barker* v. *Furlong*, '91, 2 Ch. 172.

SALE OF LAND—Purchaser in possession—Where a purchaser took possession and failed to complete his contract by paying balance of purchase money by stipulated day, the court would not, in an action for specific performance, order him to pay the money into court without giving him the option of retiring from possession or of paying balance into court, with interest from date of contract for sale; such an option will not be granted if he has done anything to prejudice the value of the property. *Greenwood* v. *Turner*, '91, 2 Ch. D. 144.

THE

WESTERN LAW TIMES.

VOL. II. JULY, 1891. No. 4.

DE PRÆSENTI.

THE LONG VACATION.

In a few days the Long Vacation will again be with us, and the fact that many familiar faces among the ranks of the Bar are already missing, and one or two of the Bench, proves, if anything were needed to prove it, that the time alloted at present for the duration of the greater legal holiday is most inconvenient and ill-selected.

We are of the opinion, which prevails, we believe, generally among the profession, that September should not be one of the vacation months. Holidays should come in the hot oppressive weather, when to work long and continuously is a severe and exhaustive labour. September is cool and bracing, well adapted for the transaction of legal business. Our hot months are July and August, and we think that the time for rest should be during these months. Some are of the opinion that the present holidays are too long, and that instead of having August and September devoted to that purpose, we should begin at the middle of July and end with August. There is much to be said in favour of this view.

The month of September was made part of vacation by the efforts of a few ultra-enthusiastic sportsmen who wanted to get off for the shooting in that month and

didn't care how the change affected the rest of the profession who were too apathetic at the time to watch the legislation going through the House. Now, we are fond of sport and enjoy nothing better than a few days shooting, and we can cheerfully sit all day in a damp canoe down at Lake Winnipeg, hid away in a reed bed with a jug of whiskey and a half-breed, and keep up a merry fusilade at the tails of such indifferent ducks as may thoughtlessly meander by.

This enthusiasm, however, is of a mild type and if we cannot manage to get away then we do not want to keep the whole profession stewing during July so that we can have the privilege of helping to fill up a marsh with bird shot in September.

And surely it must not be forgotten that September is an active, busy, month, and it cannot seriously be contended that litigants must chafe impatiently in the courts because the very few sanguinary and ferocious sportsmen of the Bar want to shoot. If they are anxious to kill something, they can borrow a dog and go out and mangle prairie chickens any time during the season, and if September were not in vacation, it need not be feared that they would let their practice interfere with their shooting.

We almost forgot to mention that this is intended as our leading article for this issue. It is too hot to think of anything else, and besides, there is a man waiting for us at the Lake of the Woods to go fishing for mock-turtle, the season for which, according to the new mining regulations, is short.

CANADIAN DIVORCE COURTS.

A bill has been introduced by the Hon. Mr. Macdonald, of British Columbia, providing for the establishment of divorce courts in all the provinces except Quebec and Nova Scotia. We hope this measure will become law, but desire now to call attention to the third clause of the bill.

3. The court shall have jurisdiction to dissolve a marriage, upon the application of a husband or a wife, upon proof to the satisfaction of the court, that the other has since the celebration of the marriage been guilty of adultery, and, *upon the application of a wife, that, since the celebration of her marriage, the husband has deserted her, without reasonable cause, for a period of not less than five years.*

This is all very well, but how about the desertion of the husband by the wife, without reasonable cause, for five years? Is he not to obtain his divorce for her desertion as well as the wife to obtain hers for his?

Has the promoter of the bill never heard of the Clitheroe case, reported in '91 Q. B. D. as *The Queen* v. *Jackson*? By this case, as the law now stands, a wife can wilfully desert her husband at the church door and thus, as pointed out *ante* p. 13, deprive him of her society, of a home, and the prospect of children to inherit his name and his property.

The effect of this section, read in conjunction with the judgment of the court above referred to, will be little less than to hold out an inducement to adultery in the case of a deserted husband. We hope this phase of the bill will receive that grave consideration which its importance demands.

FORENSIC ELOQUENCE.

Forensic eloquence has not by any means departed from us. Speaking of the Tranby Croft Affair the *Solicitors' Journal*, for June 13th, says:

The event of the week has been his (Sir Edward Clarke's) concluding speech for the plaintiff in the Baccarat case, one of the ablest and most skilful pieces of advocacy which has occurred in our generation. We think it may be said that not a point which could tell in favour of his client was missed; that the difficulties of the case were cleverly grappled with; and that the obligation of the robe, to which he referred at the commencement of his address, "to disregard all private friendships, all political associations, all personal interests in the discharge of his duty towards his client," was fulfilled. Eloquent, powerful, temperate, and courageous, the speech maintained the best traditions of the Bar.

On the same subject the *Law Times*, June 13, says:

It is universally admitted that the forensic skill with which the two distinguished leaders conducted their cases in *Cumming* v. *Wilson* has not been surpassed in modern times. Sir Edward Clarke previously enjoyed a reputation as an advocate second only to that of Sir Charles Russell. Probably, to-day, the general opinion is that the distance between them has been reduced if not dissipated . . . . Singular, is it not, that the three most prominent common law leaders, Sir Charles Russell, Sir Henry James, and Sir Edward Clarke, never graduated at any university.

The same can be said of many of the greatest names in the history of the Canadian Bar.

LIMITATION OF ATTORNEY'S RETAINER.

The case of *Hett* v. *Pun Pong*, reported in the current number of the Supreme Court Reports, is one worthy of the careful attention of every solicitor, as it considers the extent of a general retainer to prosecute an action. Mr. Justice Strong held that such a retainer does not terminate when the judgment is obtained, but makes it the duty of the attorney or solicitor without further instruction to proceed after judgment and endeavour to obtain the fruits of the recovery thereof, including the making it, by registration, a charge on the lands of the judgment debtor. The Chief Justice, Sir William Johnstone Ritchie, remarked, however, "I wish to make an observation in respect to the duty of solicitors to register judgments independent of instructions, having had a large experience in New Brunswick, and knowing that in that province there are certain expenses connected with such registration, as a judgment would have to be registered in every county. In my office a judgment was never registered unless information was given by the client that there was property in a particular county, but execution was issued within a year and a day." Mr. Justice Gwynne, p. 301, appeared to incline towards a similar view. The point however, was not decided, owing to the finding of the Court that there were special instructions in the case in question.

Bevins v. *Holme*, 15 M. & W. 88, quoted by Mr. Justice Strong, certainly supports his contention, as does also *De la Pole* v. *Dick*, 29 Ch. D. 35.

THE CAPE LAW JOURNAL AND OURSELVES.

We take the following extract from the May issue of the *Cape Law Journal:*

. . . The *Western Law Times* takes as a compliment the fact that the size of the *Cape Law Journal* is the same as the *Western Law Times*. The *Western Law Times* was established somewhat recently, barely a year ago. The *Cape Law Journal* has flourished since the year 1884. So we certainly did not compliment the *Western Law Times* in 1884. But the praise of the *Western Law Times* is nevertheless welcomed by its "far-off contemporary," and we thank our far-off contemporary for the fatherly suggestion that "the legal cards in the advertising supplement would be none the worse for a little editorial revision, there being too much display to be in keeping with the high-class character of the journal. . . ." Well, the *Western Law Times* is young and—promising.

According to Whittaker's Almanac it takes 22 days to communicate with the Cape by post from London. We can get to London in nearly half the time, eleven days, over the Canadian Pacific Railway, the new and shorter highway to the East. We think our remarks as to the *Cape Law Journal* being relatively "far-off" are allowable.

The only inference to be drawn from the remarks as to the size of our contemporary is, that it has been ever since 1884 the same size as it is now, and therefore they could not have changed their size and followed our lead.

Our readers will be perhaps surprised to hear that the *Cape Law Journal* did not assume its present size and much improved appearance till November, 1890, *or nearly eight months after this journal was first issued.*

Come, come, our gentle adversary, at least be fair, and state "the truth, the whole truth, and nothing but the truth."

And yet again. We did say that the legal advertising in its supplement needed revision. But why does the *Cape*

Law Journal suppress the reason we gave for asking that we "might be allowed to make one suggestion only" as above? Such reason is represented by a meaningless string of dots, but the words suppressed were these: "*particularly as it is under the superintendence and control of the Incorporated Law Society of the Cape of Good Hope.*" (See title page, November, 1890.)

This is a sample, much reduced in size, of the legal cards in the supplement of a law journal "under the superintendence and control of the Incorporated Law Society of the Cape of Good Hope":

HARRY SOLOMON

(DEPUTY-SHERIFF),

LAND, LAW, ESTATE AND GENERAL AGENT,

Auctioneer and Conveyancer,

POTCHEFSTROOM, TRANSVAAL,

☞ Reference:—C. J. JUTA, Esq., High Sheriff.

We think our remarks, in this connection also, may be justified without having to disfigure our columns with a *facsimile* reproduction of this flaring "sign" in displayed "caps."

A WORD OF WARNING.

We again desire to caution the legal profession against the proceedings of a canvasser for advertisements for an illustrated pamphlet descriptive of this city. He solicits the portrait of members of the profession, and prints an article in regard to each, for all of which only the trifling sum of $50 is asked, and even less we understand will be taken. He is so obliging as to give those willing to go into the scheme an order on a city photographer to get their photographs taken. He has approached many of the

most respectable members of the profession with his seductive enterprise, but they have refused to listen to his blandishments, having enough self-respect to prevent their stooping to this most reprehensible form of touting. We refer to this matter now so that no one can say he had not due notice of the scheme, and if any one so far forgets the duty he owes to his fellow practitioners as to encourage it, he must not be offended if his feelings are hurt by plain speaking on the part of this journal should the forthcoming pamphlet contain a notice regarding him.

A TALKATIVE BENCH.

"A Practising Barrister" writes to the *Law Journal*, supplementing the remarks of Sir Richard Webster, *ante* p. 84.

SIR,—When I was called to the Bar, over twenty years ago, it was the custom for the Bar to talk and the Bench to listen. We have changed all that, and it is now the custom for the Bench to talk and for the Bar to listen.

In these days counsel are not even usually allowed, when they are arguing *in banco*, to state their case, but it is extracted from them by cross-examination, with the result that what would be a clear, consistent statement is rendered too often confused, while important matters are kept in the background, and those which are quite unimportant are dragged prominently forward.

Can anything be more deplorable than the scene which constantly takes place in Appeal Court 1, where it frequently happens that counsel, having carefully got up their arguments, are not allowed to deliver them?

To use sporting language, it is an even chance that at any moment one Judge will be talking, it is a six to one chance that two will be talking, while it would be practically safe to bet fifty to one that all three Judges are talking together.

I only mention this Court as affording the most flagrant instance; but this degradatiou of manners has unhappily spread to nearly all the Courts that sit *in banco*.

Such scenes as take place now would have been impossible twenty or thirty years ago, when four Judges usually sat together, in grave, dignified, courteous silence, carefully considering the arguments addressed to them, and no more capable of rudely or unnecessarily interrupting counsel than they would be capable of such conduct towards any other gentleman who was speaking to them.

I am not one of those who think that the Judges of to-day are inferior to the Judges of old times; and I look upon the incessant talking which takes place on the Bench as a bad habit which has spread from one Judge to another.

I am, however, convinced that the fact that an enormous number of cases are overruled is due to the habit which Judges have got into of forming a hasty conclusion, sometimes without having given counsel a chance of properly stating the case; that instead of listening to counsel they spend their time in talking and arguing themselves, and that they frequently snub and browbeat counsel, who are as able as themselves, and frequently decide cases without giving counsel an opportunity of addressing a real argument to them. I write this letter not with the mere intention of finding fault, but in the hope that the Bench will learn from your columns what is the feeling of the Bar on the subject, and that they will take to heart the lesson that it would be a great saving of time, and conducive to decency, propriety, and justice, if the Bench would learn to listen and would cease talking.

FLOTSAM AND JETSAM.

LIST OF LICENSED CONVEYANCERS.

As many persons calling themselves "conveyancers" unlawfully extort money from the public for drawing legal documents, we give here a complete list, kindly furnished by the Provincial Secretary, of all those who are entitled to call themselves "licensed conveyancers" and perform the duties of that office. Any others styling themselves "conveyancers" and acting in such capacity for hire in this province are imposters, and should be dealt with as such. There is no need at all for the extension of this list. The excuse for the office has passed away, and the act should be repealed.

No.	Name.	P. O. Address.	When Appointed.
1	James W. Horne	Emerson	8th June, 1881.
2	Charles R. Tuttle	Winnipeg	"
3	John B. McKilligan	"	17th June, 1881.
4	David G. Dick	Dominion City	25th "

No.	Name.	P. O. Address.	When Appointed.
5	Duncan McKercher	Dominion City	25th June, 1881
6	Johnson M. Grover	Emerson	25th "
7	A. T. Bernier	Ste. Agathe	2nd July, 1881.
8	A. A. C. LaRiviere	St Boniface	2nd "
9	Paul Kingston	Winnipeg	9th Aug., 1881.
10	John Hogg	Portage la Prairie	5th Sept., 1881.
11	W. J. McLeary	Winnipeg	23rd "
12	W. E. Scott	"	8th Nov., 1881.
13	W. J. Manby	"	8th "
14	Geo. Lindsay	Griswold	3rd Aug., 1887.
15	John James Cochrane	Deloraine	12th "
16	John Horsman	Oak Lake	13th Jan., 1888.
17	James P. Alexander	Souris	30th July, 1889.
18	Michael Long	Gretna	7th Jan., 1890.
19	C. F. Collins	Miami	21st Feb., 1890.
20	Thomas Stock	Winnipeg	21st Mch., 1890.
21	James Andrew	Oak Lake	13th May, 1890.
22	Allan Sutherland	Russell	17th July, 1890.
23	John Dupre	Russell	1st April, 1891.

ASSINIBOIA COURT FORMS.

Through the kindness of Mr. Justice Dubuc we are able to furnish our readers with some interesting copies of legal forms used in the old courts of Assiniboia. These blanks were printed in both English and French, and in size are about 8x4 inches:

(1) GENERAL COURT.

To.....

I hereby order you to appear in this Court on Thursday, the..... day of.....18 , to answer..... in an action of damages for having .....

.....

Red River Settlement,.....18 .

(2) GENERAL COURT.

To.....

I hereby order you to appear in this Court on Thursday, the..... day of.....18 , to answer..... ..... in an action of debt to the amount of £ s. d.

Red River Settlement,.....18 .

(3)

To.....

I hereby order you to bring before me .....to answer to a judgment of debt amounting to £.....s.....d. awarded against him at the..... .....Court....at the suit of.....

Red River Settlement,.....18 .

....Magistrate.

(4)

TO THE GAOLER.

I hereby order you to imprison on a charge of

185 .

Red River Settlement,

Magistrate.

SETTLING ACCOUNTS IN MYSORE.

The following manner of settling accounts in Mysore we take from *The Indian Jurist.* We might introduce the system to great advantage in wrangles over partnership accounts in Canada:

An old Tahsildar in the Combatore District once told us a story of how Tippu, Sultan of Mysore, managed his Jamabandi. The accounts were placed before the Potentate. They were not quite what he had expected, but all his efforts failed to extract any satisfactory explanation, so the Sultan heaved a sigh and said: "I am sure there is something wrong. The balance ought to be more than that. Hang these Tahsildars! The three Brahman Tahsildars present were at once strung up, and after that the accounts were as clear as crystal, and the balance altogether satisfactory.

BRIEFS.

MR. JOHN ALEXANDER MACHRAY, of Winnipeg, was called to the Bar during Trinity term.

MR. THOMAS WILLIAM CLARK, of Lethbridge, Alberta, was enrolled as an advocate of the North-West Territories on the 11th instant.

THE HON. MR. JUSTICE DUBUC has gone to the Lake of the Woods to spend a portion of the long vacation.

THE *American Law Register* which, according to the *Central Law Journal*, was the oldest of the law journals proper in America, has ceased to exist. It was started in 1870, and some little while ago had a very considerable reputation, but latterly had lost its *prestige* to a great extent. We are sorry that when it gained its majority this year it did not acquire at the same time a new and vigorous lease of life. Still, twenty-one years is not a short life for a periodical.

THE London *Jurist* has been incorporated with that interesting and well-edited paper, *The Law Students' Journal.* We cannot conscientiously regret this extinguishment, as the *Jurist*, in its last few issues, at least, borrowed altogether too freely without acknowledgment from its contemporaries to suit our fancy. Nothing is so bad in a legal journal, which above all things ought to be fair and honest.

LADY MACDONALD, widow of the late Prime Minister of Canada, has been raised to the peerage as Lady Macdonald of Earnscliffe. We are strongly opposed to the granting of peerages or hereditary titles in the colonies. While we have nothing to say against the system in the mother country, it is not adapted to colonial life or thought. As

to knighthood: well it is scarcely worth considering, since it has become so cheap. Some of our Canadian judges declined the *honour* in the Jubilee year.

A TREATY has been entered into between Her Majesty and the President of the Orange Free State for the mutual extradition of fugitive criminals. The treaty came into force on April 6, and may be terminated by a notice not exceeding one year and not less than six months. The full text is given in the *Canada Gazette.*

A BILL is now before the Commons enlarging, to a very considerable extent, the jurisdiction of our Exchequer Court, especially in regard to claims to public lands, and interpleader suits where the Crown is interested.

WE HAVE received from Mr. R. B. Gordon, Queen's Printer for the North-West Territories, a copy of Mr. Justice McGuire's useful "Hand-Book for Magistrates, in Relation to Summary Convictions and Orders, and Indictable Offences." The government of the N. W. T. have very wisely procured a number of copies of the book, which they distribute at cost price, 80 cents, to all magistrates. This is an excellent idea, which could be followed with advantage in this province.

AT A meeting of the Bar Committee, held at the Luncheon-room, Lincoln's Inn, on Tuesday last, Sir Henry James was re-elected chairman; Mr. W. F. Robinson, Q. C., vice-chairman; Mr. E. P. Wolstenholme, treasurer; and Mr. S. H. Lofthouse, hon-secretary. The following resolution was passed: "That it having been represented to the Bar Committee that cases exist in which the sons of County Court judges are in the habit of practicing before their fathers, the Bar Committee desire to record their opinion that such a system should be as far as possible discouraged, and that copies of this resolution be sent to the Lord Chancellor and the Attorney-General."

THE Evidence in Criminal Cases Bill, recently introduced by the Lord Chancellor, has met with unexpected opposition, and has, we understand, been withdrawn.

THE LAW SOCIETY OF MANITOBA.

Convocation.

WINNIPEG, TUESDAY, JULY 14, 1891.

Present, Mr. Isaac Campbell, Q. C., president; Mr. Alex. Haggart, secretary; Messrs. Kennedy, Q. C., Richards, Perdue and Cameron.

The minutes of the last meeting were read and confirmed.

Letter from J. H. Wrigley, of 30th April last, read and considered. Ordered that the secretary write him that this Society will admit to the Bar advocates from the North-West Territories on their complying with the rules of the Society as to notices and payment of fees.

Letter read from Mr. W. Morris, dated June 2, with regard to the Society painting a portrait of his father, the late Hon. Alexander Morris. Ordered that the secretary acknowledge receipt of same and state that the matter will receive the consideration of the Benchers.

Letter read of June 23, 1891, from Mr. R. D. Richardson, re printing.

Letter read from Mr. MacMurchy, of June 4th, asking for an exchange of Manitoba reports with Ontario reports for the County of York Law Association. Ordered that the secretary write him that the Benchers could not see their way clear to carrying out an exchange as suggested, because of prior arrangements.

Letter from Mr. Pendergast re admission of barristers from Quebec. Ordered that the secretary write him to forward the certificate referred to in his letter as to examinations in Quebec.

Letter from Mr. Wade re bill of costs *Re Ashbaugh.*

Letter from S. W. Lobb, dated July 6, 1891, asking for return of $30 paid by him for admission as student at law. Ordered that request be granted.

Letter read from Mr Ghent Davis, dated July 14, 1891, applying for an increase of salary as reporter. Mr. Perdue gave notice of motion that the salary of the reporter be $1200, the increase to commence on 1st September next.

Letter read from Mr. E. A. Leeston-Smith, dated July 8, 1891, containing a statement of facts he desired to lay before the Benchers re Mr.

A--, an attorney. Ordered that the secretary write him in reply that the Benchers consider they have no jurisdiction in the matter on the facts as stated; and that if Mr. Leeston-Smith has a grievance he can apply to the courts.

Letter read from Mr. W. J. Manbey, dated June 3, 1891, with regard to a person in his neighborhood illegally acting as a conveyancer. Ordered that the secretary write Mr. Manbey that if he will undertake to prosecute the matter the Society will pay any reasonable expenses, not exceeding the sum of $30.

Letters of June 9 and 16, 1891, from Mr. Herbert Acheson. Ordered that the secretrry write Mr. K—, of Brandon, for explanation.

Letter read from Mr. H. G. Fisher, dated July 7, 1891, as to whether he could be admitted as a student at law without attendance in a barrister's chambers. Ordered that his application be not granted.

Report of Examining Committee, July 2, adopted.

Donald Forrester, a graduate, admitted as student at law and articled clerk.

Ordered that the coming into force of by-law 20, altering the subjects for examination, be suspended until the last day of Hilary term next.

Report presented from the Examiners, dated July 11, 1891. Ordered that the same be received and adopted.

Ordered that Mr. A. L. Vining be admitted as a student at law and articled clerk.

Ordesed that Messrs. John D. Hunt and F. H. Mitchell be allowed the first intermediate examination.

Ordered that Messrs. J. H. Leech and W. W. Cory be allowed the second intermediate examination.

Ordered that Messrs. J. O. Smith and W. R. Ross be allowed the final examination for attorney.

Ordered that Mr. J. A. Machray be called to the Bar.

Petition presented from Mr. W. R. Ross that his final examination for attorney be allowed him. Ordered that the prayer of the petition be granted.

The librarian reported the presentation to the Society, by Mr. Archer Martin, of a portrait of the late Mr. Recorder Thom, framed and glazed. Ordered that the secretary acknowledge receipt of same and convey to Mr. Martin the thanks of the Society for his present.

Letter read from the librarian requesting leave of absence. Report presented from the Library Committee, dated July 14, 1891, recommending that the leave be granted.

FRIDAY, JULY 17, 1891.

Present, Mr. Isaac Campbell, Q. C., president; Mr. Alex. Haggart, secretary; Messrs. Kennedy, Q. C., Richards, Nugent, Perdue and Cameron.

Minutes of last meeting confirmed.

The motion, of which previous notice had been given, that the salary of Mr. Ghent Davis, the reporter, be $1200, the increase to commence on 1st September next, was put and declared carried.

Letter read from Messrs. Patterson and Wade, the examiners, dated July 14, 1891, asking for an increase in their remuneration. Ordered that the same stand until next term for consideration.

Ordered that a cheque be issued to Mr. Wade for the balance of his account rendered *Re Ashbaugh*, the amount to be certified to by Messrs. Munson and Cameron.

REVIEWS.

THE JURISPRUDENCE of the Privy Council, containing a digest of all the decisions of the Privy Council; a sketch of its history; notes on the constitution of the judicial committee; a summary of its procedure; and also three appendices. By J. J. Beauchamp, B. C. L., advocate and revising barrister. Montreal, A. Periard 1891, roy. 8 vo. half calf.

The author of this most excellent work has conferred a real boon upon the profession by giving them, in this handsome volume of 920 pp. the results of the decisions of the first tribunal of the world. We hope that the bar will, by its hearty support, enable Mr. Beauchamp in some measure to reap the fruit of his labours. Such a work has long been needed and expected, and, after a critical examination, it appears to us to fill every requirement. It is called a digest, but is really more than that in many instances, as the judgments of the court are not seldom given *in extenso*. The arrangement of subjects and classification throughout we have found to answer every test we have subjected them to. Nothing more can be said in praise of a digest and book of reference such as this is. The introductory historical sketch is a commendable feature without which the book would be incomplete; the assertion, however, that in England "there have always been a king and the upper and lower houses forming a

parliament," is open to doubt, or at least to a diversity of views. The notes on the constitution of the Privy Council are good, and the summary of procedure, with useful, instructions, tariffs of fees, and forms is eminently practical.

Appendix A treats of the British Colonies and nature of their civil law, and condenses a great deal of information in tabular form. The remark in this table referring to Manitoba is, "Detached from the North-West Territories in 1870," and looking at the N.-W. T. the remark is, "Settlement ceded by England to the Hudson Bay Co. in 1766 and bought by Canada in 1871(?)." This is the only mistake we have found in the work. The H. B. Co. derived under their charter of 1670 and the laws in this country to-day are the laws of England as they existed prior to date of charter, as modified by subsequent enactments of our legislature after 1870.

Appendix C consists of a *double* alphabetical table of cases, a matter but too often neglected.

The book is handsomely got up, good paper and clear type; the binding is specially neat and tasteful. In conclusion we can only say that this work should, and doubtless will, at once take the high place in the legal library that it is justly entitled to.

Epitome of English Decisions.

No new numbers of the Law Reports have arrived since our last epitome, so we are unable to continue our regular monthly review.

THE

WESTERN LAW TIMES.

VOL. II. AUGUST, 1891. No. 5.

DE PRÆSENTI.

ANOTHER "HOLIDAY NUMBER."

Vacation is now half over, and we are glad to say that there are not many cases to report this month, so our brethren of the long robe will bless the holidays for that at least. We heartily welcome them in the editorial sanctum, as we know of nothing more discouraging on a fine afternoon, when almost all our legal friends are away, than to have to sit down to extract the legal points out of say fifteen closely written foolscap pages of mixed law and fact, an herculean task that we lately had to "tackle," so if our columns appear more than usually dry this month, our patient readers will know to what to ascribe the reason.

A DISGRACE TO THE BENCH OF KANSAS.

The *Central Law Journal* for Aug. 7, inst., has the following article on one McKay, a Kansas judge, which for plain speaking we commend for perusal to those unenlightened ones who do not think that it is proper for the legal press to censure those members of the bench who bring disgrace upon it, and the administration of justice into contempt.

The extraordinary proceedings described in recent despatches, on the part of the Kansas judge, who was elected to that position by the farmers' organization, because he was not a lawyer and didn't know any law,

appeard to be a natural sequence of the election of an ignoramus to the bench. His actions would be ludicrous if they were not so serious in their results. The legal aspect of the matter is that he has defied the Supreme Court of the State of Kansas by setting aside its order in a foreclosure suit. To enforce his own order he has caused the arrest and imprisonment of the receiver of the property for contempt of court in obeying the order of the higher tribunal, and has caused the arrest of the sheriff for releasing the receiver upon a writ of *habeas corpus* granted by the Supreme Court. He is reported to have refused to give any attention whatever to proceedings for the foreclosure of mortgages, stating, as his reason, that such actions are oppressive to the people. It was proposed at the time of the election of this "freak," to send him to a law school before taking his seat on the bench. But the plan was abandoned, and doubtless with reason. It is plain to be seen from his antics that the man not only never knew any law, but that he is incapable of acquiring it. He lacks in a woeful degree that common sense which, in a judge, is as necessary as, and often passes for, legal learning. Even a jackass knows better than to try to impede the progress of a locomotive. But this Kansas species doesn't hesitate to antagonize the Supreme Court and public opinion as well. The overthrow of accepted legal procedure and the defiance of acknowledged authority may seem the proper thing to the jaundiced visions of fanatics, but it will hardly commend itself to civilized people. If the organization which elected this man and which it is claimed now upholds him, stands for dishonesty in the treatment of creditors and irregularity in the administration of justice, its early dissolution is to be hoped for. As for "Judge" McKay, his career should be cut short by removal from the position he has disgraced.

The people of Manitoba would think it a monstrous thing to be inflicted with such an apology for a man, but we regret to say that there is a judge of a county court of this Province who repeatedly openly defies and burkes the acts of our legislature, and who habitually scoffs at the decisions of the highest court of this province, and of the highest courts of the empire, lessening, of course, by such actions the respect of his hearers, but none the less subverting justice and making his court a by-word among those who would gladly shun, but have to frequent it.

To such an extent has this been carried that one of the leading counsel in this province, Mr. Howell Q. C., the other day declared in our hearing at the opening of a trial in the Queen's Bench that "the conduct of the county

court judge at the hearing of the case before him was a reflection on the administration of justice in Manitoba, and a disgraceful proceeding in a court of justice!" It is with great reluctance that we feel called upon to give publicity to these facts, but our duty to the public is plain, and we will not shrink from it, yet at the same time we trust that we shall not be compelled to refer to this subject again, and that the judge will endeavour to restore a feeling of confidence in the procedure of his court, and act more in harmony with the feelings of the profession and the public at large.

DECORUM IN COURT.

To a member of the Bar of Canada it seems difficult to believe that during the hearing of the Baccarat Case such a want of order prevailed that certain of the public applauded one counsel and hissed another, and acted in such a manner as to bring forth the rebuke from the Lord Chief Justice—"This is not a theatre." From a perusal of the correspondence between the Lord Chief Justice and a member of the Temple, it appears that the sovereign alone has the right of a seat on the bench, and all others who sit there do so on the invitation of the presiding judge, a courtesy which in England is extended to ladies, and was so in the above case to a marked degree. We are glad to say such is not the practice in Canada, and the prevailing opinion is that the fewer laymen on the bench the better. Ladies may have been accorded a seat on the Canadian bench in other provinces in Canada—if so, such cases are very rare—but we understand that it has never occurred in Manitoba, and we hope it never will. The court of Queen's Bench in this province is conducted with a degree of decorum and proper sense of dignity on the part of bench and bar most creditable to a new country, and it seems more than strange to us to read in the columns of the English legal

press of scenes in the historic courts of Britain surrounded, as we are wont to think, with the prestige of centuries, which could not occur in this newest province of the new Dominion across the sea.

JURORS AS WITNESSES.

The following instance of a juror giving evidence is worthy of notice:

At the recent Bedford Assizes, a prisoner on his trial for rape, after giving evidence himself in denial of the charge, under the Criminal Law Amendment Act, 1885, proposed to call one of the jurors as a witness to his character. Mr. Justice Williams declined to allow the juror to be sworn, but said he might give his fellow-jurors the benefit of his knowledge in deliberating on the verdict, and this having been done, the jury acquitted the prisoner. We have much doubt whether the practice pursued was in accordance with precedent. It appears to be a settled rule (see "Best on Evidence," 7th edit. p. 193) that a juryman may be a witness for either of the parties to a cause which he is trying, and "it is essential that this should be so, as otherwise persons in possession of valuable evidence would be excluded if placed on the jury panel, and might even be fraudulently placed there for the purpose of excluding their testimony." It is said, too (see "Starkie on Evidence," 3rd edit. p. 542), that if a juror know any facts material to the issue he ought to be sworn as a witness, and if he privately state such facts, it will be ground of motion for a new trial. The rule was applied to a criminal trial in *Regina* v. *Rosser*, 7 C. & P. 648; and though we can find no instance of its being applied to a witness merely to character, we cannot but think that it ought to be applied to such a witness, on the ground that the test of cross-examination cannot be properly employed to testimony privately given in the jury-box. It is true, no doubt, that witnesses to character are seldom cross-examined, but their liability to cross examination is undoubted. Moreover, if evidence as to character be given privately in the jury-box, there will not be the same facility for the prosecution, under 6 & 7 Wm. IV. c. 111, giving evidence, if they should happen to possess it, that the prisoner has been previously convicted of felony.—*Law Journal.*

NEW JERSEY LAWYERS AND THE STAMP ACT.

Under the title of "How New Jersey Lawyers Boycotted the British Stamps," the *New Jersey Law Journal* has an interesting article on the self-denying and patriotic efforts of these gentlemen to frustrate the operation of the

obnoxious Stamp Act of 1765, the news of the passing of which was received in Boston, as everyone knows, by the tolling of bells and flying the flags of the shipping at half-mast. On Feb. 13, 1766, the lawyers passed the following resolution :

"'It is agreed and determined by a majority of the lawyers now met at New Brunswick, to preserve that happy state of peace and tranquility which has by the blessing of God hitherto been maintained in this Province of New Jersey, to desist from their practice till the first day of April next, and if they receive no accounts from the Parliament they will in such case begin their practice as usual, or sooner if earlier accounts are received from the Parliament.' The Stamp Act was repealed in March. During all that winter the people refrained from pressing their legal claims, and the lawyers gave up their business rather than use the hated stamped paper, and so by stopping the action of the courts brought discredit upon the Government and made the stamps useless. This quiet and self-sacrificing action of the lawyers of New Jersey was quite as effective a means of bringing about the repeal of the Act as the noisier demonstrations in the other colonies."

THE ROLL OF ILLUSTRIOUS ADVERTISERS.

On p. 187 of vol. I, we had occasion to make some remarks on professional advertising and defined the generally accepted limits which restrict that practice in this province. We give below an example of a legal card from the North-West Territories very lowering to the dignity of the Bar there. For the benefit of all similarly inclined we intend to open a "Roll of Illustrious Advertisers," and give each gentleman, who feels that his legal qualifications must be bolstered up by printers' ink, a gratuitous advertisement, affording him thereby an

opportunity to give no little amusement to our readers, even if he have no other qualifications which would entitle him to consideration at their hands.

Each "Illustrious One" will be assigned a number, and judging from one or two advertisements which have been sent us, it looks as though we will have additions to make to our "Roll" in our next issue, unless they are altered in the meantime. The following galaxy of occupations is taken from the *Regina Leader* and as four prior advertisements have been given, this shall be assigned its proper place on the "Roll," which is

No. 5.

W. SYME REDPATH, Avocate, Notary Public, Issuer of Marriage Licenses and Insurance Agent.

Office over Beauchamp's Store, Qu'Appelle, N.W.T. Box 42.

We desire all our exchanges to remember that such advertisements are very rare indeed in the North-West Territories. Only one of the three previous ones was from the N. W. T., the others were from London, England, St. Johns, New Brunswick, and this province.

WOMEN AS STUDENTS-AT-LAW.

The special committee of the Law Society of Upper Canada, which was directed by the benchers to consider the application of Clara Brett Martin to be admitted as a student-at-law has wisely, we think, reported against her request. As the matter is one of importance, we give the full text of the Report:

REPORT OF THE SPECIAL COMMITTEE ON THE ADMISSION OF CLARA BRETT MARTIN AS A STUDENT-AT-LAW, TO BE CONSIDERED BY CONVOCATION ON TUESDAY, 15TH SEPTEMBER, 1891.

The Committee to which was referred for consideration the petition of Clara Brett Martin begs leave to report as follows:

The question raised and which has to be determined, is not whether it is desirable that women should be admitted as students of the Laws, as is asked in the petition in question, but whether the Law Society of the

Province of Ontario is permitted to allow a woman to be entered as a student of the Laws, as a step to her becoming a member of the Law Society.

The Statutes which incorporate and regulate the Law Society do not in terms apply to women, but the interpretation clauses of the Interpretation Act, so far as material and applicable are made to apply to the Rules and Orders of the Society; the Act, of course, applies to the Statutes in question. We have therefore Statutes, Orders and Regulations, which, although in their terms do not apply to females, are extended by the Interpretation Act so as to include females as well as males. It is to be observed, however, that at the time this enactment and these rules and regulations were passed, women were not empowered in Canada or Great Britain, under any circumstances, to be entered as Members of the Legal Societies. For centuries in England, this rule, which still exists there, has been observed. The rules and regulations based upon the Statutes in question, from their tenor show that it was thought that the aforesaid Statutes only empowered the Society to deal with male applicants.

The question seems to be whether or not the Statute is to be interpreted according to the usage that existed at the time it was passed, or whether it is to be interpreted by the advanced views of the present day. In some countries it has been found sufficient to cause a conclusion in the first alternative, that the words used in the Statute are of the masculine gender, and that long established custom and sound policy forbid a construction by the Statute which will include women. As to a similar matter, it has been asserted that when for several hundred years it has been continuously assumed and the assumption acted upon, that women are not of ability to vote, it is not incorrect to say, they are under a legal incapacity.

In some cases where a woman has claimed a Common Law right to office, and it has been accorded to her, the decision in her favor has been based on the fact, that it is an office which can be exercised through deputy.

In several of the States of the United States of America applications of the kind made here were in the first instance refused by the Court which was asked to admit the person making the application, the Judge holding that there was no Common Law authority for the admission of women—that it would be a departure from the judicial function after a settled practice of centuries to inaugurate an innovation upon the long usage to the contrary. Many other reasons have been from time to time assigned by the authorities to whom these various applications have been presented, and the suggestion was made that the function was legislative, and unless power was derived from that source, the request made should not be acceded to.

Your Committee submits that authority was not intended to be given to the Law Society of Upper Canada to admit women as members thereof,

that the Statutes, Rules, and Regulations aforesaid do not authorize it, and that the prayer of the petition should not be granted.

The following authorities and reviews may be consulted with advantage:—

See Lady Sandhurst's case, 23 Q. B. D., 79.
Chorlton v. Lings, L. R. 4 C. P. 375.
Article, 18 Irish Law Times, p. 306, "Women and the Bar."
Review, 30 Albany Law Journal, p. 464.
Article, Sol. Journal, Vol. 12, p. 762, "Are Women Men?"
Article, American Law Review, N.S., Vol. 4 (1883), pp. 670, 675, 6-7-8-9.
Bradwell's Case, 55 Ill., 535.
Goodell's Case, 39 Wis., 232.
Robinson's Case, 131 Mass., 376.
Pump Court, April 25, 1891, p. 2.

THE MAYBRICK INSURANCE CASE.

The latest feature of this celebrated case, which has attracted so much attention on this side of the Atlantic, is treated by *The Law Journal* as follows:

In the remarkable Maybrick insurance case the High Court has held, on a special case stated for the opinion of the Court, that an action on a life policy effected on his life by the late Mr. Maybrick for the benefit of his widow (who was convicted of having murdered him), and of their children after her death, could not be sued on by the trustees of his will. The ground of the decision was that it is not in accordance with public policy that the convict Maybrick should recover money payable on an event which had been brought about by her own felonious act, and this in accordance with the rule in the case of the forger Fauntleroy (*The Amicable Society* v. *Bolland*, 4 Bl. (N.S.) 194) and in that of the murderer Palmer (*The Prince of Wales Insurance Company* v. *Palmer*, 25 Beav. 605). It appears to have been assumed that the conviction in *Regina* v. *Maybrick*, although followed by a commutation of the capital centence to penal servitude for life, was conclusive evidence of the felonious act of the convict. Is this quite in accordance with authority? We are inclined to doubt it, the parties in *Regina* v. *Maybrick* and in the Maybrick insurance case not being the same. If, for instance, a prisoner convicted of bigamy sue for administration of the second spouse's effects, the validity of the second marriage can be set up, notwithstanding the conviction (*Wilkinson* v. *Gordon*, 2 Ad. 152, and see *The Duchess of Kingston's Case*, 2 Sm. L. C.) It was held, however, in *Palmer's Case* that the coroner's inquisition charging him with murder was *prima facie* evidence of the murder; and since Mrs. Maybrick was not called upon to disprove the murder of her husband, as on a *habeas corpus ad testificandum* (see 43 Geo. III. c. 140, and

44 Geo. III. c. 102) she could have been, there seems little doubt that the recent judgment is substantially correct. Perhaps, however, on the death of Mrs. Maybrick the action could be brought again for the benefit of those entitled to a reversionary interest in the policy.

FLOTSAM AND JETSAM.

THE HABITATION OF THE JUDICIAL COMMITTEE.

Most of our readers will be not a little surprised to know the kind of place in which all our greatest cases are decided. We quite agree with the *Law Notes* that such an august tribunal should be housed in a manner becoming to its dignity.

Have our readers seen an article by Mr. Stanley Leighton M. P., in "Greater Britain"? Writing of the Judicial Committee of the Privy Council, he says: "On the site of the cockpit attached to the old Palace of Whitehall, in the first house on the right-hand side turning from Parliament Street into Downing Street, is a small room on the first floor, amidst a labyrinth of clerks' offices. You may read on a brass plate on the door of the house, 'The Privy Council Office.' If you enter you will find yourself in a mean lobby or vestibule, and if you ask your way to the Court, an attendant will direct you up a narrow staircase with an iron handrail. On the first story you may see a painted hand pointing 'to the Court.' You enter under a curtain, and six venerable gentlemen will be discovered sitting around a table, attired in ordinary dress. In a little box in front of them are four barristers, wigged and gowned. An usher, a clerk, a reporter, and three attorneys' clerks, complete the audience. There is little accomodation for the public, so you sit down with the three lawyers' clerks. This is the local habitation of the highest Court of appellate jurisprudence in the empire. If you were to ask a friendly barrister where this great Court sits, you would not find one in a hundred who could tell you. The policeman in the immediate precincts would be puzzled if you put the same question to him. Yet here, unnoticed and little regarded, in the midst of humble surroundings, is a Court the like of which the whole world has never seen before. Here is a Court of appellate jurisdiction, which revises the decisions of judges in every quarter of the globe, which is the ultimate appeal to which hundreds of millions of people resort." Surely it is about time so important a Court was properly housed. We will be bound that the Courts of any South

American Republic would put us to shame- But then, most of the South American Republics have built their public edifices out of borrowed money—not yet repaid.

SALE OF A WIFE.

We take the following interesting communication from *Notes and Queries* for July 11 ult.:

French travellers, when describing the moral and social aspects of England, rarely forget to inform their readers that it is customary in this country for men to sell their wives, like any ordinary chattel, in open market—a fact (for fact it appears to be) that we one and all repudiate. The following paragraph appeared in the part of the *Wellington Journal* published June 6 :—

"A WIFE SOLD IN A HALTER.—On Monday, at Wakefield, in a case in which Samuel Eccles, a miner, of Allerton-Bywater, was summoned for the maintenance of his child, it was stated that defendant and his wife had been separated since June, 1887, and that the woman was sold in a halter in the Borough Market Hotel, Wakefield, for half a guinea, and went away with another man."

As a pendant to this I transcribe the following account from the *Lady's Magazine* for 1816 :—

"SMITHFIELD BARGAIN.—One of those scenes which occasionally disgrace even Smithfield, lately took place there—namely, a man exposing his wife for sale. Hitherto we have only seen those moving in the lowest classes of society thus degrading themselves, but the present exhibition was attended with some novel circumstances. The parties, buyer and seller, were persons of property. The lady (the object of sale), young, beautiful and elegantly dressed, was brought to the market in a coach and exposed to the view of her purchaser, with a silk halter round her shoulders, which were covered with a rich white lace veil. The price demanded for her in the first place was eighty guineas, but that finally agreed on was fifty guineas, and a valuable horse upon which the purchaser was mounted. The sale and delivery being complete, the lady with her new lord and master mounted a handsome curricle which was waiting for them, and drove off, seemingly nothing loth to go. The purchaser in the present case is a celebrated horse-dealer in town and the seller a grazier of cattle residing about six miles from London. The intention of these disgusting bargains is to deprive the husband of any right of prosecution for damages."

C. A. WHITE.

Preston on the Wild Moors, Salop.

FACETIÆ.

OYER WAS HIS UNCLE.—He introduced himself to me by blandly contradicting a statement that I had made to

my companion concerning a matter in Chicago, about which I had a rather intimate knowledge. A little later I remarked that the law in New York was so and so. He observed that I was mistaken. Of course the conversation did not concern him, but I was so foolish as to reply. I mentioned a certain case in the Court of Oyer and Terminer. He replied severely that I quoted it incorrectly.

Then—more foolishly—I got a little nettled, and offered to bet and show him the report.

"If the books hev it that way the books is wrong," he answered, blandly.

"Indeed," said I, "You seem to have rather an intimate acquaintance with Oyer and Terminer." I thought that would crush him.

"Huh—well, I should say," he answered, triumphantly.

That staggered me a little, but I ventured to ask him how he got it, and what do you think he said? Without changing a muscle, he retorted.

"Mr. Oyer is my uncle!"—*Chicago News.*

JUDGE—"What's the prisoner charged with?"

Officer—"Whiskey, yer Honor."—*Harvard Lampoon.*

A NOTED criminal lawyer was making a discourse to the jury in defence of a party on trial for burglary, whose face bore an expression of child-like innocence.

"Gentlemen of the jury," said the learned advocate, "Look upon the face of my client and tell me if it does not carry the perfect imprint of honesty!"

Sarcastic Juror (sotto voce)—"Yes, but the print contains many typographical errors."—*Central Law Journal.*

BRIEFS.

In an illustrated pamphlet descriptive of the business advantages of this city we notice the portraits of Messrs. H. M. Howell, Q. C., J. S. Ewart, Q. C., N. F. Hagel, Q. C., and W. E. Perdue. Though these gentlemen have, as we are informed (Mr. Ewart excepted,) paid for their portraits with hard coin of the realm, we do not think they have received a *quantum meruit*, for we look in vain for the customary and time-honoured biographical sketch stating that each one is at the top of the profession in British North America, and in the possession of a "dome of thought" that would knock the aggregated intellect of all the Lord Chancellors into "original fragments." *Hinc illæ lachrimæ.*

Mr. K. Graburn of this city desires us to state that his name should be on the list of Licensed Conveyancers appearing in our last issue, as he obtained a license in 1882, which apparently was overlooked by the Provincial Secretary of that date.

Mr. Frederick Wm. Young, of Boissevain, has been gazetted a conveyancer. There is no necessity for this appointment at all, for there is a solicitor residing at Bosssevain, and the Attorney-General should see to it that the interests of the legal profession are protected, and that these appointments which have become a question of politics, should be kept within bounds, or in fact no more made at all. There is nothing to compel the appointment after the examination is passed, as the very first section of the act gives the Lieut.-Governor-in-Council full discretion in the premises, which is of course the Government, and within the province of the Attorney-General.

CHANCELLOR McGILL of New Jersey has decided, according to the *New York Law Journal*, that a sale by a master of the court of some property was illegal because the advertisement was printed in the German language, and has refused to confirm the sale. The New Jersey legislature last winter passed a law making it mandatory in all judicial land sales to publish an advertisement in one German newspaper. The chancellor decided that the advertisement in the German paper should have been in English, quoting from 4 and 5 Geo. II, which provides that all judicial proceedings after 1733 shall be published in the English language. Before that they had been in Latin. Another sale has been ordered.

THE council of legal education in London has made many important changes in the system of legal education as it now obtains in the various Inns of Court. The new consolidated regulations of the Inns for admission of students and call to the bar, as of May, 1891, will be found in the *Law Journal* for July 25, ult., as also an interesting article on the new system.

MR. BERTRAM TENNYSON of Moosomin, Assiniboia, was enrolled an advocate of the North-West Territories on July 14, ult., and Mr. John A. McCaul of Macleod, same district, was likewise enrolled on the 24th of same month.

THE Exchequer Court sits here on Thursday, Oct. 1 at 11 a. m.

At Regina on Monday, Oct. 5, same hour.

At Vancouver on Tuesday, Oct. 13, same hour.

At. Victoria on Tuesday, Oct. 20, same hour.

OBITUARY.

Alexander McLean, Esq., Sheriff of the Central Judicial District of Manitoba, who had been appointed to the office *vice* J. J. Setter dismissed about two years ago, died suddenly on the 22nd of July last at his home at Portage la Prairie, from the result of an accident. Mr. John J. McRobbie has been appointed Mr. McLean's successor *pro tem.*

Mr. Andrew White Thomson, B. A. and L L. B. of the University of Manitoba, and an attorney of this Province, eldest son of Mr. James Thomson, clerk in the Land Titles Office for the Winnipeg district, died on the 21st day of July last after a short and painful illness. The deceased was a brother of Mr. R. M. Thomson, of Messrs. Davis & Thomson, of this city, and was unmarried. He was born in Hamilton, Ontario, on Dec. 31, 1862, and had lately been in charge of the legal work in connection with Dun, Wiman & Coy's mercantile agency in this city. His untimely death is much regretted.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. II. SEPTEMBER, 1891. No. 6.

The Disbarring of Barristers.

The consideration of this subject, as it applies to the province of Manitoba, has to be undertaken on a very different basis from that which it would receive if the bar of England, or any other country where the two professions are entirely distinct, were under consideration. Here however the majority of the bar have also served their time under articles and been enrolled as solicitors of those courts before which they practice as barristers. Such gentlemen act therefore in a dual capacity, but at the same time their actions in each capacity are generally capable of clear definement. A ready illustration of this can be seen in the case of election for benchers in which one who is both a barrister and attorney can vote as a barrister but not as an attorney. This, it may not be out of place to remark, places the attorney in an unenviable position as he now contributes the same annual fee towards the maintenance of the Law Society of Manitoba, which regulates both professions, as does the barrister, (in fact, till lately he contributed $15.50 and the barrister only $2.00) yet he has no voice in its proceedings. The English solicitor can vote in the elections of the Incorporated Law Society, on becoming a member thereof, and the barrister in those for the Bar Committee governing his order, but the attorney here, though he contributes to the support of both, has nothing to say in the councils of either. This is perhaps

the most striking peculiarity which has arisen under the partial fusion of the two professions, and we believe the same state of affairs obtains in the Law Society of Upper Canada, which in like manner regulates the professions in Ontario.

As the forms of procedure by which barristers are called to the bar and solicitors admitted to practice in England are not as well understood by the profession here as they should be, we shall shortly consider them, especially as we were not a little surprised to learn from the remarks made by a leading counsel on a late application *re attorney* that he seemed to think barristers in England became such through the medium of the Incorporated Law Society and not that of the Inns of Court!

By statute the Incorporated Law Society is the Registrar of Solicitors, is entrusted with the examination of all persons wishing to become solicitors, has the custody of the Roll of Solicitors, and is entitled to notice of any application to strike the name of a solicitor off such roll, and the motion must be made to a committee of the Council of such society in the first instance which hears and reports the same to the High Court of Justice.

The fact, however, of a man being a solicitor does not make him a member of the Law Society, in order to become which he has to pay certain fees and conform to certain regulations. The reasons and causes for which solicitors are struck off the rolls are well known to our readers and are followed almost religiously by the courts of Canada.

A student at law desiring to be called to the bar in England joins one of the four Inns of Court—Lincoln's Inn, the Middle Temple, the Inner Temple, and Gray's Inn—and after keeping his terms and conforming himself to the Consolidated Regulations of the four Inns promulgated in May last (*a*) is finally called to the bar by the Benchers of the

(*a*) See *The Law Journal* for July 25 last for full text of these regulations.

Inns who exclusively possess that right. "The actual ceremony of being called" says the late Mr. Serjeant Robinson in his valuable and entertaining book (*b*) "was very short and simple. On the appointed day, while the Benchers and bar were in the hall prepared to sit down to dinner, I happened to be the senior of nineteen infatuated beings, who, habited for the first time in the full panoply of gown, wig, and bands, and each brimful of hope of speedy distinction, walked up the hall and stood in a row before our venerable superiors. We then took a short oath that we would do our duty to the Inn, to the public, and to our clients,—should we ever have any—and the formal business was at an end. We sat down to our repast as usual, and, as soon as the Benchers had retired from the Bench table, private friends were allowed to flock in and partake of wine and dessert at the table assigned to their particular host, and revels were generally kept up to a late hour.

Next day, with light hearts, but many of us with aching heads, after the severe trials of the night before, we had to take divers oaths before a judge in a Bail Court, containing allusions not very complimentary to the Pope, or the Pretender, whoever that might be. After this swearing, which was, I recollect, interspersed with a fair sprinkling of cursing, I was entitled to call myself barrister-at-law." On the preceding page Mr. Robinson remarks, "as a preparative for investiture, the aspirant who has sufficiently dined must get himself proposed by one Bencher and seconded by another in the parliament chamber, where the official business of the Inn is conducted, and, if his character is unimpeached the fiat for his call goes forth. But no one could claim to be called as a matter of right. The Benchers might reject the candidate's application, if they pleased, but always subject to an appeal to the body of judges as visitors of the Inn; and their decision was

(*b*) Bench and Bar, 3rd ed., London 1891, p. 26.

final." It is important to be borne in mind that this authority to call to the bar is possessed by the Benchers alone, the power "having been in very remote times delegated to the Inns of Court" to use the words of Lord Wynford in a Privy Council case. (*c*)

To the Inns of Court, which are, it must be remembered, voluntary societies, likewise belong the powers of disbenching and disbarring their members, and their decisions in these matters are final and conclusive, subject only to an appeal to the Lord Chancellor and the judges as visitors. (*d*) We cannot state specifically what the grounds are for which a barrister may be disbarred as there is no case in the reports to inform us of the conduct of such proceedings—at least we have been unable to find one after a careful search. The matter is incidentally referred to in a once well-known case, (*e*) the defendant in which was the notorious Dr. E. V. Kenealy Q. C. a trustee and bencher of Gray's Inn who had been disbenched and disbarred by that Inn in 1874 for a series of outrageous assaults in the columns of his newspaper, *The Englishman*, upon the dignity, honesty and impartiality of the Bench in the Tichborne Trial, going so far as to accuse one of the judges of deliberate falsehood. It may however be safely assumed that any member of the Inns of Court would be disbarred for "conduct unbecoming to a barrister," and Lord Wynford said in the case before mentioned that he had no doubt but that the English Courts would "prevent a barrister who had acted dishonestly from practising before them," and Lord Chancellor

(*c*) *Re Justices of Antigua* 7 Knapp 267.

(*d*) *Ibid. Manisty* v. *Kenealy*, 24 W. R. 918.

(*e*) *Manisty* v. *Kenealy, supra.*

On Jan'y 29, 1873, Mr. Skipworth, a barrister-at-law, was fined $500 and sentenced to three months imprisonment for bringing charges of partiality against Cockburn C. J. and endeavoring to prejudice the course of justice in the trial indictments which had not yet come to trial in the Queen's Bench. *Regina* v. *Castro*, 54 L. T. 269.

Westbury stated in another Privy Council case (*f*) that "it must not be supposed that a Court of Justice has not the power to remove the officers of the court *if unfit to be trusted with a professional status and character.*"

In Ontario the Law Society of Upper Canada has by statute the right to call to the bar in that province and "the applicant can only be admitted through the doors of the Law Society to practise at the bar of the Courts" therein. (*g*)

The powers to call and disbar are there expressly conferred by statute. We give the sections of the act in the Rev. Stat. of Ontario, cap. 145.

Sec. 35. The Benchers may from time to time in Convocation make rules for the government of the Law Society, and other purposes connected therewith, under the inspection of the Visitors.

Sec. 39. The Benchers shall have the power heretofore exercised to call and admit to the practice of the law as a barrister any person duly qualified to be admitted according to the provisions of law and the rules of the Society.

Sec. 44. Whenever any person, being a barrister or solicitor of the Supreme Court of Ontario . . . has or may hereafter be found by the Benchers of the Law Society, after due enquiry by a committee of their number or otherwise, (*h*) guilty of professional misconduct, or of conduct unbecoming a barrister or solicitor it shall be lawful for the said Benchers in Convocation to disbar any such barrister and to resolve that any such solicitor is unworthy to practise, etc.

Sec. 47. Any powers which the Visitors of the Law Society may have in the said matters of discipline, are hereby vested in the Benchers of the Law Society, and the powers by the preceding three sections of this Act given to the said Benchers may be exercised by them without reference to, or concurrence in by the Visitors.

By Sec. 30 of the Solicitors Act R. S. O. cap. 147, where a solicitor is struck off the Roll of the High Court the Registrar of the Division of the High Court in which such order is made shall certify the same under his hand and seal to the Secretary of the Law Society who shall attach

(*f*) *In re Wallace*, L. R. 1 Priv. C. 295.

(*g*) *Hands* v. *Law Soc. U. C.*, 16 Ont. 635. *In re De Sousa*, 9 Ont. 46.

(*h*) The Benchers and their committees have the power to examine witnesses under oath and enforce attendance. R. S. O. c. 146, s. 36.

the certificate to the certified copy of the roll and enter such striking off in his official record; and by a rule of the Law Society upon any order being made by the court whereby any person being a member of the Society (i. e. a barrister), and also a solicitor, is struck off the Roll of Solicitors "such person so ordered to be struck off the Roll shall *ipso facto* be suspended from the exercise of all and singular rights, powers and privileges belonging to him in this Society, or elsewhere, as a member thereof, and such suspension shall continue until such person be restored to the Rolls as a Solicitor."

The result of this provision is of course to declare that any barrister who so misconducts himself in his capacity as a solicitor as to be struck off the rolls forfeits immediately his degree or rank of barrister-at-law.

This is an eminently fair and just provision and has the additional merit of being unmistakeable and expeditious in its results.

When we come to consider the subject as it relates to this province we are met by grave difficulties at the outset. To begin with, who is a member of the Law Society? The whole drift of the Act is to confine the members to barristers only, as in Ontario, and yet the penultimate clause declares:

CCCXLIV. It shall be lawful for the Court of Queens Bench, upon *rule nisi*, to hear and determine any complaint that may be made against any member of the Law Society in the discharge of his duties as barrister *or an attorney-at-law*, and *such* member of the Law Society so offending may, according to the gravity of the offence, and in the discretion of the said Court of Queen's Bench, be either suspended from practising law in any court of this Province, or struck off the roll and disabled from practising either as an attorney or solicitor or barrister in any of the said courts.

This certainly assumes that solicitors are members of the Law Society, but nowhere does the act confer on them that status, either expressly or by implication, and, beyond doubt, they have no right to vote in the proceedings of the Society.

The admission of candidates for call to the bar of this province is not vested in the Benchers, as it is in Ontario, by the express enactment above quoted, nor does our Law Society Act contain any provision empowering the Benchers "to call and admit to the practice of the law as a barrister" as does the Ontario Act.

The Law Society Act simply says:

CCLXXXVI. Except the persons above named (those admitted to the bar and in actual practice before passing of the Act), the following persons and no others, *may be admitted* to practice at the bar in any of Her Majesty's Courts at law or in equity of the Province of Manitoba.

The Act then names three classes of persons who *may be admitted* all of whom have to conform more or less to the rules of the Society.

It is a remarkable fact that it nowhere declares that either the Benchers or the Law Society have this power of admission, which in this country they can only have by statute, as does the Ontario Act. The only clause giving the Benchers power in this connection is in sec. cccxxiii.

The Benchers may, from time to time, make, amend, repeal rules and by-laws:

(1) For the government of the said Society, and other purposes connected therewith;

(2) For regulating the *qualifications and examinations* for admission of members as students of the said Society, and for call to the degree of barrister, and for admission as an attorney-at-law.

The clause in the Ontario Act corresponding to this sub. sec. (2) is far wider.

40. The Benchers may from time to time, make all necessary rules, regulations and by-laws and dispense therewith from time to time to meet the special circumstances of any special case respecting the admission of students-at-law, the periods and conditions of study, the call or admission of barristers to practice the law, and all other matters relating to the discipline and honour of the Bar.

Yet even this manifestly only relates to matters of procedure. The express power to call given the Ontario Benchers by sec. 39 above quoted is absent from our act.

The rules of the Law Society of Manitoba in fact show that the Benchers do not pretend to possess the power to call to the bar. (*i*)

Rule 54. Every candidate, upon his being called to the Bar, shall appear in a barrister's gown *for the purpose of his being presented to the Superior Court*; and he may be so presented by any Bencher present in Court.

The corresponding rule in Ontario is:

5. Every candidate for call to the Bar *must be presented to Convocation* by an instrument in writing signed by a barrister of Ontario etc.

And as though to set the matter entirely at rest the sub-section added to sec. cclxxxi of our Act above quoted by 51 Vic. c. 17, enacts that after the expiring of the respective periods of time provided for by the prior sub-sections "any Judge of the Court of Queen's Bench may, at the request of the Law Society, administer to such person the oath required by the Law Society to be taken by its members, *and the Oath of Allegiance, and* ADMIT *such person to become duly enrolled as an Attorney and Solicitor or Barrister as the case may be*, as provided in the Act hereby amended."

Such being the case, the Benchers have no statutory authority to call to the bar. This leaves, in fact declares that power to be in the hands of those in whom it rested before the Law Society Act was passed, that is, in the judges of the Court of Queen's Bench of Manitoba. There is no doubt that the preparation of the candidate and the certificates of his having complied with the requirement of the statute and the rules of the Society are in the hands of the Benchers, but it appears to us quite as clear that no one can arrive at the degree of barrister-at-law in Manitoba unless

(*i*) It is true that there is a form of certificate of call to the bar which recites, on what authority we know not, that the barrister was called to the bar "by the Benchers of the Law Society of Manitoba in Convocation." This is cribbed bodily from form K of the rules of the Law Society of U. C., doubtless by the same slovenly draftsman that drew our slovenly act.

he has been admitted by a judge or judges, and has taken the prescribed oaths and signed the roll in his or their presence. We are of the opinion that the Court of Queen's Bench here still preserves intact that inherent power to call to the bar which is incidental to all colonial courts, unless destroyed by statute.

We will consider in our next issue the means by which, and for what cause, a barrister may be disbarred in this province.

(*To be concluded.*)

DE PRÆSENTI.

THE PROFESSION IN AUSTRALIA.

We learn from the *Australian Law Times* that "A Bill to regulate the Practice of the Legal Profession" by amalgamating the two branches of it, has passed the Legislative Assembly and is now before the Legislative Council. Our contemporary takes very strong ground against the bill, and undoubtedly advances some weighty arguments against its becoming law, especially as we gather from it that neither of the two branches desires the fusion to take place. We also agree that such amalgamation is not likely to result in making the administration of justice any cheaper, as this is a question of tariffs which are regulated by the judges, at least with us. The *Times* points out with great force that it would be far better for the legislature to seek to remedy the backward state of business which, it alleges, stagnates the law courts, than to trouble itself about the workings of the two branches of the profession. We can go thus far with our contemporary, but we cannot agree with it that "the bill might rather be called a bill to lower the *status* of barristers and to lessen the education of both branches of the profession." On the contrary we believe that the state of affairs which admits of a barrister being a solicitor at the same time, but not necessarily so, and so act in both branches of the profession, is far more applicable to colonial life, and life in new countries, than keeping the professions apart; nor do we see that there is any danger of the lessening of education in either branch of the profession. Quite the reverse. We are of the opinion that the knowledge of a barrister is much enlarged by his being familiar with the work of a

solicitor, and *vice versa.* The whole thing works itself out, because those barristers who are also solicitors and desire to devote their exclusive attention to counsel work after they have arrived at a certain distinction, can do so, and we have only to look at the leading counsel in Canada and consider the very high degree of excellence that they have attained in the practice of their profession, to know at once that they would be a credit to the bar of any country. We need say nothing about our Judges. They need no commendation. By the founding of proper law societies and by keeping up a high standard for admission as attorney and for call to the bar, there is no danger of the deterioration of either branch of the profession. There is no reason why, should our Australian learned friends adopt our system and like us found law societies which will guard the interests of the profession and keep up a proper *esprit de corps*, that they should not have a body of men who would occupy the highest place in the land as does the profession of the law in Canada to-day.

JUDICIAL INCAPACITY.

The following article taken from *The Law Times* will be read with interest in connection with our recent remarks on the actions of a county court judge residing not a thousand miles from Winnipeg:

The questions asked in Parliament respecting the capacity of one of the judges of the High Court to discharge the duties of his office, gives an interest to the following instances of judicial incompetency.

The illustrations to which we direct attention are all Irish: for in Ireland the force of public opinion in official circles was, a generation or two ago, almost imperceptible, and is at the present moment weaker than in England.

On the 5th May 1826, Mr. Scarlett, afterwards Lord Abinger and Lord Chief Baron of the English Court Exchequer, presented to the House of Commons a petition complaining of the inability of Lord Norbury, the Chief Justice of the Irish Court of Common Pleas, to discharge judicial functions. Private members had then the privilege of making a speech explaining the object of a petition, and of moving a resolution and instituting a debate on the subject-matter to which the petition related. The

petitioner in this case was Daniel O'Connell, "the Irish barrister," who was a couple of years afterwards destined to become famous in Parliament. Catholic emancipation had not been carried, and Parliament was still unreformed, and O'Connell could not obtain the services of one out of the hundred Irish members to present his petition. Mr. Scarlett moved the resolution, regretted that the case was not in the hands of an Irish member, and stated he presented the petition "to show that he would not shrink from the discharge of any duty, however odious it might be, relative to the administration of public justice." Mr. O'Connell in his petition begged it to be understood that he preferred no imputation on the honour or integrity of the learned Lord. He alleged simply that he was incapacitated from the adequate performance of his judicial duties by the infirmity of old age. In particular, Lord Norbury was so subject to lethargic stupor, that he would frequently fall fast asleep in the middle of the trial over which he was presiding. In one instance it occurred that on a trial for murder, which took place in Ireland, he fell asleep, and so remained during the greater part of the evidence. The consequence was that he delivered such a charge to the jury as led to the conviction of the prisoner, who, however, was afterwards very properly pardoned. Another instance was mentioned. At Mullingar six persons were tried before Lord Norbury who was sound asleep during the greater part of the trial. The fact of his being asleep was so notorious that the barrister who conducted the prosecution requested the jury to take notes of the evidence, in order that they might inform the judge of what had passed when he awoke. Mr. O'Connell also stated in the petition that he was well aware that his interests were opposed to the course he had adopted in bringing the subject before Parliament, but his motives were pure and for the public benefit. Mr. (afterwards Sir Robert) Peel, who was then Chief Secretary for Ireland, while eulogizing Lord Norbury, stated that he would probably have resigned if he could have done so without the imputation of being intimidated by the threat of that petition. This rather lukewarm defence can be explained by the fact that when Lord Norbury sometime previously had been sounded by the "Castle" on the subject of his resignation he threatened to call out (he had been a notorious duellist in early life) anyone who ventured again to broach the topic. O'Connell's petition, however, did good, for early next year Lord Norbury, who was then eighty-six years old, retired.

Again, on the 3rd May, 1866, forty-four years almost to the very day after the Norbury incident, the case of another Irish Chief Justice—Lefroy—was brought under the notice of Parliament. Mr. Bryan, one of the members for Kilkenny county, asked the Attorney-General for Ireland, Mr. (afterward Mr. Justice) Lawson, whether he had seen a statement publicly made to the effect that the Lord Chief Justice of the Queen's Bench in Ireland when passing sentence of death on a prisoner was unable to read the sentence, although it was written for him in large handwriting, and that his Lordship required and had the assistance of some

other person in the discharge of that solemn duty. The Attorney-General, in reply, simply admitted the substantial accuracy of the statement. Mr. Anthony Lefroy, who represented Trinity College, Dublin, and was the son of the Chief Justice, was thereupon permitted by the house to maintain in argument the judicial capacity of the Chief Justice, stating the Attorney-General had failed to do justice to his father. Mr. Lawson then said that, as the hon. gentleman had cast a doubt upon the correctness and accuracy of his statement, he would relate what occurred in his presence on the occasion in question. The day on which the execution was to be carried out had been arranged beforehand, and the officer of the court wrote out in large writing for the Chief Justice the sentence to be pronounced, and the Chief Justice proceeded to pronounce it, but was totally unable to do so in the legal form. He omitted in the sentence a material direction, the omission of which would have rendered the sentence bad in point of law. It became upon this his duty as Attorney-General, prosecuting for the Crown, to call the attention of the Chief Justice to the irregularity and omission in the sentence, and he was obliged himself to stand near him at the bench and ask him to repeat over again in legal form that sentence, and he actually dictated to him the sentence in the legal form which the Chief Justice delivered. These were the simple facts, and the statement of them could be verified by those present. A few months afterwards the Conservative Government, by which Chief Justice Lefroy was appointed, came into office, whereupon he immediately resigned, being at the time in his ninety-first year.

These retirements were no doubt due to the attention directed to these scandals by their mention in Parliament. Another judicial resignation was due to a prisoner. A Mr. Pennefather, who was on the Irish Bench during the forties, lost his sight; he still retained his post. A prisoner, whom he was trying for writing a threatening letter, asked his Lordship to examine the document so as to compare the writing with the writing of the prisoner. This observation was the direct cause of his Lordship's retirement.

A TRAVELLING EDITOR.

The editor of an American law periodical, *The Albany Law Journal*, has been on a tour in the unknown land of Europe and he has published his impressions of that backward region in his magazine. The impressions, it may be observed, have nothing to do with law. They do not even mention the tribunals, or the wigs and gowns, or the forensic peculiarities of Europeans. The traveller is a lawyer, and his journal is written for lawyers. Yet the admistration of justice is never once referred to. He devotes much space to Englishwomen, their want of taste in dress, and the size of their hands—in connection with which we are informed that the editor's daughter takes five-and-a-half's in gloves, and that that lady could not find a pair of her size in London! And with characteristic modesty, this editor remarks that "whenever you see a very pretty

woman, either in England or France, you are safe to bet she is American." For a turnout of fashion, Rotten Row is nothing in comparison with the Bois in Paris! but the "establishments are not on the whole so elegant and showy in either as in Central Park!"

This Ulysses seems to have missed many of his home comforts while in our hemisphere. Some he does not mention, but we can imagine the awful though secret agony it must have caused him to suppress his yearning to spit indiscriminately and incessantly, in dangerous proximity to the skirts of the peerless beauties aforesaid. Some he does mention. He laments the want of rocking chairs and iced water (at what season in this climate could any one but a fever patient have a craving for iced water?); he never tasted "a decent piece of roast beef in London"; the barbers are barbaric (*sic*), charge too much, rise too late, and jar on the refined American ear by dropping "h's." And so forth. *C'est magnifique, mais ce n'est pas* very appropriate in a law journal.

We take the above from *The Journal of Jurisprudence*, the first of our British exchanges to notice the vagaries of our Yankee friend. Let us remark first, however, that the wearing of wigs and gowns is not peculiar to Europe. The bar of Canada all wear gowns, and in one province at least, British Columbia, wigs are added. The climate is too hot in summer for them to be worn with any comfort in other provinces. To be fair our traveller did in one of his later letters give his impressions of the Royal Courts of Justice * in the course of which he remarked on the peculiarity of witnesses having to stand, upon which one of his own readers wrote a letter to his journal pointing out that he need not have gone off to England to notice such a peculiarity (?) as "this rule prevails in Massachusetts." The rest of his discoveries are of quite equal interest. Imagine a man actually stating in print that he "did not get a decent piece of roast beef in London"! and that his daughter could not find a pair of five-and-a-half gloves in" the same city! And then to compare the star-spangled snobbery of Central Park with the turnouts of Rotten Row and the Bois!

But remember that this is the same scribe who calmly announces in his journal that the Supreme Court of the

*Albany Law Journal, Aug. 15, p. 125.

United States is "the greatest tribunal in the world" to the utter extinction of the Privy Council, and that Lincoln's Gettysburg oration is "as immortal as our language and without a rival since Pericles"! Let us draw the veil. Ye Gods, to think that all these are but as nothings to the fearful jingle of the poetry he published with his said "impressions"!

WHAT ARE LAW REPORTS?

As the minds of a good many barristers, and not a few judges, do not appear to be quite clear as to what constitutes a law report, it might not be out of place to consider what are entitled to be called such, and to be cited as such before a court of law. As a matter of fact even in England there exists no set of reports which is entitled to be called "official." The nearest to it is a series of reports issued by the Incorporated Council of Law Reporting for England and Wales, but this cannot be called official in the true meaning of the term. A compromise is sometimes affected by calling them the "authorized" reports, though it is not easy to see why they should be so called any more than "official." Wharton, in his Law Lexicon, states that prior to 1865 law reports were all published as mere private speculations, and the best series of these, and that which retains a prestige far above all others, whether "authorized" or "official" or anything else is yet known as the Law Journal Reports, dating away back to 1823. The Weekly Reporter was first published in 1852, "as a portion of, and in conjunction with *The Legal Examiner*."

The fine reports published as The Jurist by the legal journal of that name cover the period between the years 1837-66. *The Law Times* began its series in 1843. The Irish Law Times Reports are now in their 25th volume.

It will thus be seen that the best reports and those of any antiquity yet in existence are those published in connection with the various legal journals. Whenever

these, or any others are published by a barrister they are entitled to be received and cited as the findings of the court by which the decision is given. In the words of Lord Westbury "as soon as a report of any case is published with the name of a barrister attached to it, the report is accredited, and may be cited as an authority before any tribunal," and that learned Lord Chancellor effectually administered a rebuke to a bumptious judge who refused to act on the authority of a case cited from The Jurist when he said, referring to this class of reports, "*it is of such materials that the law of England is made up, and I would be denying myself much valuable assistance in ascertaining what the law is, if I were to refuse to receive the citation of cases reported by barristers in these useful publications.*" (*a*)

FLOTSAM AND JETSAM.

LINCOLN AS A LAWYER.

After a man has achieved greatness, or had greatness thrust upon him, and died, all sorts of post-mortem honors spring up and attend upon his name, the very suggestion of which would have provoked him to a smile when living. The story of the Indian who, for a single drink of whisky, would relate to a crowd how, at Braddock's defeat, he had seventeen fair shots at Washington and missed him every time, whereby it was concluded that God was miraculously preserving Washington for his great destiny, is well remembered. Another such story has started about Abraham Lincoln; how a client of his forced him to go to Cincinnati and attend court there, where his client was but one of several defendants, the other defendants being

(*a*) *Francombe* v. *Francombe*, 11 T. L. N. S., 757.

represented by Edwin M. Stanton; how Stanton feared that the presence of such a looking specimen as Lincoln would ruin their whole case; how the trial came off; how Stanton made the leading speech, which lasted all day; how Lincoln had been, throughout the speech, the observed man in the court, owing to his ugliness no doubt; how he finally arose and addressed the court in a speech of about one hundred words, and then sat down; how in these one hundred words he presented an entirely new aspect of the case; and how the judge thereupon put the question, "Gentlemen, what have you to say to that point," and, then, of course, decided the case on the point which Lincoln had suggested. Whatever title Abraham Lincoln has to fame, it is a misrepresentation of his character to ascribe to him any great distinction as a lawyer. He was a second or third rate western country lawyer, who possessed some learning and a good deal of native wit, but whose chief power lay in pleasing a jury and in telling a smutty anecdote to a lot of old farmers. Lincoln became great through the fact that he was called upon to fill the role of a leader in a crisis and that he had strength enough to endure it and to get through it. A thousand other men would have done it equally well. His great power consisted in holding together all sorts and factions of men, who were really or nominally on the side of the Union, and in keeping the peace among them. No one can ever forget his own quaint remark that he "had very little influence with the administration."—*American Law Review.*

THAT WILLIAM G.-C.

The following verses will amuse our readers anent the Baccaarat Case:

THAT WILLIAM G.-C.

(By One of the Defendants.)

What I wish to remark—
And my language is plain—

That the baccarat lark
  For so paltry a gain
Of Sir William G.-C. was peculiar;
  But the lady has married her swain.

On September's ninth day,
  At the famed Tranby Croft,
We all sat down to play
  At a game we'd played oft;
But he played it that night, did Sir William,
  In a way that was certainly soft.

'Twas a family game,
  And A. E. took a hand,
But we heard him exclaim,
  "I cannot understand
Why folks hide their stakes on the table."
  And his smile was not childlike or bland.

But the coin that was made
  By Sir William G.-C.,
And the tricks that he played
  Making one counter three,
Though they were not observed by the banker,
  Were noticed with horror by me.

Then I caught Lycett's eye,
  And he gazed upon me;
Levett rose with a sigh,
  Saying, "Can such things be?"
And I said, "It's too hot, my dear fellow,"
  So we split on Sir William G.-C.

In the scene that ensued
  H. R. H. had a hand,
And the storm that was brewed
  Has since burst in the Strand;
And the tricks that G.-C. had been playing
  Are known through the length of the land.

Now the Press, you'll remark—
  And its language is plain—
Says for ways that are dark
  And for tricks that are vain
That baccarat case was peculiar;
  But the lady has married her swain.

(G. R. Sims.)

—Dagonet in *London Referee* of June 14th.

BRIEFS.

THE Assizes will be holden at Winnipeg on Tuesday, October 20, before the Hon. the Chief Justice of Manitoba:

At Portage la Prairie on Tuesday, October 27, before the Hon. Mr. Justice Dubuc.

At Brandon on Tuesday, November 3, before the Hon. Mr. Justice Killam.

THE Equity Sittings will be held in this city on October 13, before, as we understand, the Hon. Mr. Justice Bain. Michaelmas Terms begins on November 30.

THE LAST number of the *Manitoba Gazette* announces that the sittings of the Exchequer Court of Canada, fixed for the first day of October, here, will not be held.

THE profession should bear in mind that Judges Chambers are held only on Thursdays in vacation, at which time matters usually coming before the Referee will receive the consideration of the presiding judge.

STILL another licensed conveyancer has been appointed in the person of William McGowan Osborne of Hartney. We would like to know when this supply "of political pap" will be exhausted.

DURING the absence of Mr. W. A. Taylor, Mr. Betournay, clerk of the county court of Selkirk, has very efficiently filled the duties of librarian.

MR. ALEXANDER DAWSON of this city, barrister-at-law, was unamiously elected as Alderman for ward three on the 15th instant.

BY instructions of the Attorney-General a report has been presented by a member of the bar on the state of

affairs in several of the County Courts. As certain proceedings will doubtless be taken on the report we are not at liberty at present to give the substance of it.

The American Law Review, in the last issue, speaks in very flattering terms of the two lectures delivered by Mr. A. E. McPhillips to the students of our Law Society some little time ago.

THE HON. ALEX. LACOSTE, Q.C., D.C.L., late speaker of the Senate, has been appointed Chief Justice of Quebec in place of Sir Antoine Dorion lately deceased.

WE HAVE to thank the Minister of Justice for an advance copy of the bill relating to the Criminal Law of Canada, which, however, we understand, will not become law this session.

A SALE OF LAND for taxes due the municipality of Westbourne, will be held at Gladstone on Tuesday, October 13th, and a similar sale of lands in the municipality of St. Clements will be held here on Thursday, October 15th, at eleven o'clock, in Wolf's auction rooms.

The Law Times, in a recent article, ably advocates the abolition of the Grand Jury system.

THE talented James Russell Lowell, whose death is much lamented, was originally a lawyer by profession.

THE late Right Hon. Henry Cecil Raikes, M. P. Postmaster-General who died on Aug. 24 ult. was a member of the bar and a bencher of the Middle Temple.

The New Jersey Law Journal has a very instructice article entitled "Last wills—a menace to titles by descent." A careful perusal of this article will well repay conveyancers or examiners of titles to real estate.

IN the *Law Journal* for August 29 ult., we see announced the death of Mr. Henry Stoakes of 8 Lyndhurst Road,

Peckham, in the 87th year of his age who was *for no less than 66 years* "with the firm of Travers, Smith and Braithwaite, Solicitors, 4 Throgmorton Avenue"!

WE REGRET TO SAY that Judge Thomas M. Cooley, so well known to us as an author of exceptional ability, has been compelled, by reason of failing health, to hand in his resignation as chairman of the Inter-State Commerce Commission. We sincerely trust that he will shortly regain his health and energy.

The Straits Law Journal very properly thinks that candidates for admission to the bar of that colony should, prior to admission, be examined as to their knowledge of the law of the Settlement so far as it differs from the law of England. This strikes us as being eminently just, such a provision being in force here and in the other English speaking provinces of Canada.

The Journal of Jurisprudence is scarcely right in referring to Sir John Macdonald as not being distinguished in law. We do not go so far as to say that the term "distinguished lawyer," used in the true sense, should be applied to our deceased Prime Minister, but in his younger days he was both an able, astute and successful lawyer and as such made his mark. When he resigned the Attorney-Generalship he did not forget his lore, for to the end his opinion on legal matters was always received with the greatest consideration in the House.

WE see from *The Law Times* that an action was lately brought in the Westminster County Court before Judge Bayley by a Mr. Travers a resident of Sidmouth street, St. Pancras, against Sir Julian Goldsmid the member for South St. Pancras, for damages "for refusing to present a petition to the House of Commons." It appears that the plaintiff had brought an action for slander against Lord Esher which was struck out on the ground that no action

against a judge would lie, but Parliament could punish judges. The plaintiff pointed out that he could only bring the matter forward in this way but the court determined that the action would not lie.

A VERY INTERESTING and instructive sketch of "Law reform in the United States and its influence abroad," by Mr. David Dudley Field, appears in *The American Law Review*. Those interested in the history and progress of law reform among our neighbors to the south, and in fact all over the world, should read this article, even though they will gather from it that very much yet remains to be done in the United States. It becomes us to very carefully consider the steps that we feel inclined to take in the reformation of our practice here, before we move in the matter.

THE LUNDY'S LANE HISTORICAL SOCIETY, in its annual report, urges the necessity of applying to the Legislature of Ontario for an annual grant of one thousand dollars or more, to assist in procuring, copying, and publishing original documents of historical importance relating to Canada. This proposition is entitled to every encouragement from all classes in Canada. We trust that that the indefatigable president and officers will succeed in their laudable efforts. We have received the last of the publications of this society, "The Story of Laura Secord," the celebrated heroine of 1813. It is only proper that the memory of this indomitable woman should be perpetuated.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. II. OCTOBER, 1891. No. 7.

The Disbarring of Barristers.

(*Concluded.*) (*j*)

In our last issue we had proved, to our own satisfaction at least, that to the judges of the Court of Queen's Bench of this Province alone belong the powers to call to the bar and admit to practice as an attorney. It seems convenient here to observe, however, that under the old Bar Society Act of 34 Vic. Cap. 10, sec. 5, the Lieutenant-Governor-in-Council was authorized "on special application, and under special circumstances" to "admit to the practice of the Law any person found duly qualified by such persons as may be appointed to examine such applicant," and several practitioners were actually called and admitted under that Act, and patents regularly issued to them, a copy of one of which we have before given (*k*). However, after the "ten persons" whom the act required to be admitted under sec. 4, before a Bar Society could be formed, had been admitted, and the Society formed with power to "make such rules as they deem fit, regulating admission to the study and practice of the Law"—a power, be it noted, much wider

(*j*) In note (*e*) *ante*, p. 130, the fine mentioned as having been imposed on Mr. Skipworth should be £500, not $500; also insert the word "of" in the fifth line of the note before the word "indictments."

(*k*) Vol. 1, p. 217.

than anything contained in our present enactment—the Lieut.-Governor did not, we are informed, exercise this discretion, but left the matter to the judges and the Bar Society.

The causes for which a barrister may be disbarred by the Benchers in this province are fixed by statute as follows: Sec. CCCXXIII.

The Benchers may, from time to time make, amend, repeal (*sic*) rules and by-laws: . . .

(5) For the striking off the roll of any barrister, and suspension from practice of any attorney for non-payment of fees due to the Society, with power to said Benchers to reinstate such barrister or attorney on such terms as such Benchers shall see fit.

This is the only authority given to the Benchers to disbar. So far as regards attorneys, they have, in certain cases, larger powers conferred by sec.

CCCXLII. In case an attorney wilfully and knowingly acts as the professional agent or partner of any person not qualified to act as an attorney, or suffers his name to be used in any such agency or partnership, on account of any unqualified person, or sends any process to such person, or does any other act to enable such person to practise in any respect as an attorney, knowing him not to be duly qualified, and in case complaint be made thereof in a summary manner to the Benchers, and proof be made thereof upon oath to the satisfaction of the said Benchers, the attorney so offending may, in the discretion of the Benchers, be struck off the roll, and disabled from practising as such attorney, and the Court of Queen's Bench may commit such unqualified person to any common gaol or prison, as for contempt, for any period not exceeding one year.

Now the Benchers having no other authority to disbar than for the cause above mentioned, the Judges of the Queen's Bench have, for, says Lord Wynford in the Privy Council case before mentioned, (*l*) "the power of suspending from practice must, we think, be incidental to that of admitting to practice, as is the case in England with regard to attorneys. In Antigua the characters of advocates and attorneys are given to one person; the court therefore that confers both characters may for just cause

(*l*) *Re Justices of Antigua*, 7 Knapp 267.

take both away." But in addition to this inherent jurisdiction, provision for disbarring by the judges is contained in section

CCCXLIV. It shall be lawful for the Court of Queen's Bench, upon *rule nisi*, to hear and determine any complaint that may be made against any member of the Law Society in the discharge of his duties as barrister or an attorney-at-law, and such member of the Law Society so offending may, according to the gravity of the offence, and in the discretion of the said Court of Queen's Bench, be either suspended from practising law in any Court of this Province, or struck off the roll and disabled from practising either as an attorney or solicitor or barrister in any of the said Courts.

Much to the regret of those members of the Law Society who pride themselves on the prestige of that body, and to the regret of the judges themselves, the court felt constrained in *Boultbee's Case* (*m*) to confine itself to striking the attorney off the rolls for misappropriating moneys as an attorney, and not disbar him as a barrister. A careful review of *Boultbee's Case*, however, shows clearly that it lays down no rule, for the matter was not fully argued before, or considered by, the court, as appears by the following extracts from the judgments of the three learned judges.

The Chief Justice said, p. 24 :

"As, however, the question of dealing with a barrister for misconduct in a different office held by him, and the propriety of punishing him in respect to the one office for an offence committed in the other, requires and deserves a good deal of consideration, I think the court should, in the present case, confine itself to making the rule absolute to strike the attorney off the roll of attorneys."

Mr. Justice Killam said, p. 26 :

"So far as the application to strike from the barristers' roll is concerned, we have not had the advantage of any argument based on other considerations than this section of the statute. I have, therefore, not considered this

(*m*) *Re John Boultbee*, 6 M. R. 19.

portion of the application in any other light, and if counsel for the Law Society desired to press the point on other grounds, I think it would be better to enlarge the application until the next term of the court."

Mr. Justice Bain said, p. 27:

" . . . It may be it (the court) has also a summary jurisdiction over barristers, or at all events, *the right to refuse to hear a barrister who is shown to be unworthy of his position.* But it is our jurisdiction under the section that has been appealed to in this case, and as the misconduct proved against Boultbee cannot be said to have been in the discharge of his duties as a barrister, I am, *without having heard the question fully discussed, inclined to think* that the section does not give us jurisdiction to order that he be struck off the roll of barristers."

From the above extracts it is easy to see that the court was specially careful not to create a precedent, but on the contrary desired to keep the question open for future discussion. We have in our last issue considered the matter from a standpoint not before taken, and have come to the conclusions above stated. Even supposing, for the sake of argument, that the court had not that inherent power which we believe we have shown it has, and that the power of the court to disbar were confined to section CCCXLIV, we must say, with all humility, that it appears to us that the court *has* power to disbar a barrister for offences committed as an attorney and *vice versa.* The section does not say that such barrister or attorney "so offending may . . . be either suspended," etc., but it says that "*such member of the Law Society* so offending may . . . be either suspended from practising law in any court of this Province, or struck off the roll and disabled from practising either as an attorney or solicitor or barrister in any of the said courts." This is, it appears to us, an important distinction, in that the complaint is not

lodged against a "barrister" or "attorney," but "against *any member of the Law Society* in discharge of his duties as barrister or an attorney at law, and *such member of the Law Society so offending*, etc. . . . ." Now, according to the contemplation of this statute, barristers and attorneys are members, and he who combines the two offices is not two members, because of such combination, but only one. How then is it possible to divide the responsibility of his acts as such member? (*n*) If he offends as an attorney he offends as a member, and offending as a member he offends as a barrister, because as a barrister he is a member. When once it is assumed, the mutual relationship is indivisible because of that very membership which incorporates and merges the two offices into the one member, and the one only. He has not a double status in the society so as to make him virtually two members, and beyond all doubt he could not be expelled as a barrister from such membership and retained as a solicitor, or *vice versa*. When, therefore, that member offends in the one office, through the very fact of that membership it necessarily reacts and offends to just such an extent in the other office, and that by virtue of such membership.

Had the expression "member of the Law Society" not been used in the act, but "barrister" or "attorney," we would probably have came to a different opinion, but this expression having been used, and it appears to us advisedly, we cannot, with all due deference, arrive at any other conclusion than we have done.

On both the grounds, therefore, of inherent and statutory jurisdiction, we believe the court can disbar because of offences committed as an attorney. Having then this

(*n*) "Speaking generally," says Chancellor Boyd, *Hands* v. *Law Soc.*, *U. C.*, *supra*, "any misconduct which would prevent a person from being admitted to the Society justifies his removal, because it indicates that he is unsafe and unfit to be entrusted with the powers and privileges of an honourable profession and a confidential office."

power, it only remains to be seen for what causes it should be exercised.

The test as applied by the Privy Council as before mentioned, is that of "dishonesty" merely. Lord Wynford, in giving judgment, said that even in England where the power to disbar was vested in the Inns of Court "I have no doubt they (the courts) might prevent a barrister *who had acted dishonestly* from practising before them." The same tribunal (*o*) decided that "it must not . . . be supposed that a Court of Justice has not the power to remove the officers of the Court *if unfit to be entrusted with a professional status and character. If an Advocate, for example, were found guilty of crime, there is no doubt that the court would suspend him*," and Lord Westbury proceeds in his judgment by staling that "*anything like general infamy, or an imputation of bad character*," would render an advocate's remaining in the court as a practitioner improper; and Dr. Kenealy's case (*p*) is an instance of the application of this latter view. The Chancellor of Ontario held in *Hands* v. *The Law Soc. of Upp. Can.*, (*q*) that "the conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister, a degree of greater rank and honour in the law; and when practitioners, as in this province, usually combine the functions of both branches of the profession, it is impracticable to discipline the solicitor and let the barrister go free. In the case in hand the broad question presented itself: was the solicitor's conduct unbecoming and unprofessional? Convocation, consisting of twenty-two Benchers, has unanimously voted 'yea,' and in such a matter no better judges can be found. Having for this reason rejected Mr. Hands, the solicitor, they cannot retain Mr. Hands, the barrister."

(*o*) *In re Wallace*, L. R. 1, P. C. 295. Mr. Wallace was a barrister and attorney of Nova Scotia.

(*p*) *Ante*, p. 130.

(*q*) 16 Ont. 625.

It is true that, as Mr. Justice Killam pointed out, the Chancellor made these remarks under another statute than ours, but if our present contentions as to the inherent and statutory jurisdictions are well founded, as we believe they are, or either of them is, then these remarks of the Chancellor are applicable.

Coming to the consideration of the practical results of our argument, we have to state reluctantly, and with no little shame, that there now stand on the rolls of the Law Society as barristers the names of two men, the first of whom is an absconder and a misappropriator of client's funds, for which he has been struck off the rolls of solicitors, and the second has recently been found guilty by the court of extorting moneys, and compounding a felony for $500 in his capacity as a solicitor, and for such acts likewise struck off the roll. Now the latter offence is a crime; apply then the tests laid down as above to the cases in point, and who shall say that the fact of both these men being still barristers of Manitoba is not a reproach to one of Her Majesty's courts? Quite irrespective of any statute, a rule should issue from the court itself for the removal of this stain on its fair name, for the present state of affairs is one which must be a source of mortification to the high minded Bench of this province.

DE PRÆSENTI.

THE ABOLITION OF THE GRAND JURY.

The blue-book of the past session which will prove of the greatest interest to lawyers, is entitled "Documents in Reference to the Abolition of the Grand Jury System," being "Copies of all correspondence between the Department of Justice and the Judges in Canada charged with judicial functions in criminal matters, as well as the Attorney-General of each Province, respecting the expediency of abolishing the functions of the grand jury in relation to the administration of criminal justice."

The number of replies received was 101, of which 48 were in favour of abolition, 41 of retention, and 12 doubtful. Many of them it is difficult to properly classify.

Of the Supreme Court only two judges gave opinions, Gwynne and Taschereau, and both for abolition. In Ontario the Chancellor and 21 county court judges were for abolition, but Chief Justice Hagarty, Chief Justice Galt, six puisne judges, Attorney-General Mowat, and nine county court judges were for retention.

The beginning of the reply of Hon. Mr. Mowat is thoroughly characteristic of this champion of Provincial Rights. He says, and it appears to us with much force: "I have to say that the Ontario Government claims that the abolition of grand juries is not within the authority of the Dominion Parliament; that the grand jury is a part of the constitution of the court, and is not a matter of mere procedure."

In Quebec those in favour of retention exceed the others; Nova Scotia leans the other way, as also New Brunswick. In Prince Edward Island those in favour are

in the majority, and in British Columbia the same view is held by a majority of one, while in the North-West Territories all the judges who have answered advise abolition. As to our own Province, four replies only were received, namely, those of Hon. Mr. Justice Bain, Hon. Attorney-General Martin, and county judges Ryan and Ardagh. The Attorney-General and the two county judges strongly advocate abolition, but Mr. Justice Bain, in a careful opinion, rather inclines to the opposite view, while at the same time stating: "I think the secrecy of the investigation before the grand jury cannot well be defended; and if the investigations such as they now make, were made publicly, they would soon be felt to be superflous. If their investigations were made public ones, they would necessarily tend to become regular trials."

It must not be forgotten that many of the most able of our judges have, unfortunately we think, not expressed their opinions on this very important question which will require much weighty consideration. We refrain from expressing any opinion as yet, and would refer our readers to the return itself, which is a closely printed document of 69 pages, containing also a number of presentments of grand juries on the subject.

A NOTABLE ASSIZE.

The Assize which was opened by the Chief Justice on the 20th instant is notable for the large criminal list and the very small civil one. The criminal list already reaches twenty-three cases, some of them the worst crimes in the calendar, and more to follow, which is an alarming state of affairs in our exceptionally law abiding community. The learned Chief Justice, in his charge to the Grand Jury, commenting on this state of affairs said:

"When visiting Great Britain, or meeting visitors here from the Old Land, I have always taken occasion to speak of the infrequency of crime with us, and to contrast, in this respect, the condition of things here, with

what is too often found in some of the western frontier parts of the neighboring country. I have been in the habit of dwelling on this as something that should be brought prominently under the notice of intending immigrants as something which should be well weighed by them when choosing a new home. I have always urged that if they cast in their lot with us, they would find themselves, not only in a land of wonderful natural resources, but among an orderly, law abiding people, where their lives and their property would be secure.

If the present state of things continues, that is an immigration argument which can no longer be made use of.

How the change is to be accounted for I can form no conjecture. It certainly is not owing to any sudden influx of bad characters from outside the province, for, judging from the depositions taken before the committing magistrates, most, if not all, the accused seem to be persons who have for a considerable time been resident here. Nor is it that a more than usual number have preferred trial by a jury to a summary disposal of their cases before a judge. For, since the close of the spring assizes twenty persons have elected under the provisions of the Speedy Trials act to be tried by a judge without a jury, and their cases have in this way been disposed of. This is a larger number than ever before, in the same time, during the almost nine years that I have had a seat on this bench.

During the summer six months of 1890 the number so tried was only eight.

The governor of the jail further informs me that, during the past six months there have been forty-two persons committed by magistrates under the Summary Conviction act, a number largely in excess of what it was during the same period of the previous or any preceding year.

At the present assize there are no fewer than twenty-three prisoners charged with offences, and some of these are, I regret to say, of a serious character.

Among them are murder, shooting with intent to murder, assaults on female children of tender years, arson, shop breaking and horse stealing."

It is sincerely to be hoped that the occasion will never again arise when similar remarks will have to be made by the presiding judge.

There are no civil jury cases, and but one non-jury case! Of course the excellent system of Tuesday Trials accounts for the absence of non-jury cases and the fact of there being no jury cases at all, shows, to some extent at least, that litigants are not so fond of juries as they used to be. Perhaps it would be more proper to say that the profession is not so fond of juries, for, as a fellow-barrister remarked to

us the other day, the life of the jury system depends on the legal profession; solicitors do not now bring their cases before a jury, and the profession leans more towards the trial before the impartial and learned judge, except in some special forms of action.

While referring to the opening of the Assize it might be as well to inquire what has become of the benches that are reserved for the public? Only a few were available and "standing room only" was the order of the day. In our opinion there ought to be some tipstaves about the court, clad in a suitable, neat, uniform, to preserve order and attend to various little matters, and generally to be on hand when required by the judges and others. The court room is a fine one, both Bench and Bar do their duty in keeping up the dignity of the Assize and the authorities should not be remiss on their part. As a matter of absolute necessity this should be at once attended to, for one of these fine mornings some healthy and vigorous desperado will bounce out of the dock, sandbag the lonely guard, and make good his escape.

THE SALARIES OF OUR JUDGES.

A debate on the question of judicial salaries occurred in the Senate towards the close of the session, in which the Prime Minister declared that "in a moderate way there is no doubt whatever that an increase in the salary of our judges is necessary. Whether it shall be particularly in favour of one class of judges or another class of judges, or what the amount of increase shall be, are questions which, of course, will have to be dealt with in detail. It is the intention of this Government next session to attempt to deal with the subject in a manner which they hope will be satisfactory to the country; but I want to say this, that without some little compromise of views, and some little sacrifice of personal ideas about judges, we should have difficulty in passing the most admirable measure in the

world even in this House, where the easiness of the circumstances of its members and their independent position render them more unlikely to criticize a liberal payment to judges than perhaps members might do in another place."

The latter portion of these remarks refers to the acrimonious debate which took place in the Commons on the same subject some time previously, which was distinguished by the customary display of ignorant and short-sighted prejudice on the part of some representatives from the turnip districts. We would ask all such to read the whole of the Minister's speech calmly, and try and be fair and just towards the judges, and endeavour to uphold the high standard to which the Bench has attained in Canada by giving salaries which will enable the judges to live, not with ostentation, but with dignity becoming their high office; or, if you prefer it, at least allow them such an income as will enable them to make some slight provision for their declining years and for their wives and families, which, to the shame of Canada be it said, they actually cannot do now, and retain their proper social position.

It is not a little surprising to think that one of the bitterest opponents to the measure in the Commons was a member of a sister profession, Dr. Sproule, who supported his narrow views in a way that displayed to the fullest extent the inconsequent vagaries of an soured mind.

His tirade against the legal profession was, it is gratifying to remember, cut short by another member pointing out that Dr. Sproule could with safety declaim against the misdeeds of lawyers, which were sure to be discovered, as the Dr. could kill off his own patients by noxious drugs with impunity and without fear of discovery, for the witnesses would be six feet under ground, and "dead men tell no tales."

COUNTY COURT CLERKS.

The prompt and ignominious dismissal of H. W. White, of Carberry, formerly county court clerk of the Judicial Division of Norfolk, for grave irregularities in his office, should be a warning to certain county clerks in this province that they must conform to the requirements of the Statute; that no secret or stealthy means of extorting money by drawing legal instruments or charging commissions on moneys recovered, or similar dishonest practices, will be tolerated; and that future offenders in this respect will not only be promptly discharged but prosecuted as the act directs. While we have the above remarks to make on this subject, at the same time we do not wish it to be understood that all county court clerks are guilty of such acts, or nearly all. We take pleasure in stating that we personally know of several gentlemen who fully appreciate the responsibilities of their office and are a credit to the same.

MR. LÉPINE AND THE JUDICIARY.

On the 14th of September, Mr. Lépine, M. P., asked in the House:

"Have the Government been informed of the serious and incurable illness of the Hon. Mr. Justice Church, and of the prolonged illness of Hon. Mr. Justice Tessier, both of them Pusine Judges of the Court of Queens Bench? Have the said judges tendered their resignations, or is it the intention of the Government soon to call upon them to resign and to appoint their successors before the next ensuing term of the Court of Queen's Bench fixed for the 15th September instant?"

The Attorney-General, Sir John Thompson, replied:

"The Government has been informed of the serious illness—I cannot say at present incurable—of the Hon. Mr. Justice Church. They have likewise been informed of the

prolonged illness of Mr. Justice Tessier, both Prusine Judges of the Court of Queen's Bench. Mr. Justice Church has not sent in his resignation. Mr. Justice Tessier has resigned. I cannot say that we will call upon Mr. Justice Church to resign, for such is not my duty, or that of the Government. A successor to Mr. Justice Tessier will be appointed before the opening of the term."

JUDICIAL GOWNS IN THE UNITED STATES.

At one time it could be said of the United States judges that the wearing of gowns was confined to the Supreme Court. Such is no longer the case, for we see by reference to the *Chicago Legal News* for October 10th, inst., that the judges of the United States Circut Court of Appeals entered that court "with the greatest dignity, clothed in their judicial gowns, and all present arose with one accord to do them honour," and "the audience was composed of lawyers, laymen, men and women who had come to see judges clothed in judicial robes, for the first time in Illinois." It further appears that at the June session of the court, at which no business was transacted except the appointment of officers, "a number of the members of the bar petitioned the court to enter an order requiring the judges in court to wear gowns similar to those worn by the judges of the United States Supreme Court. The court then determined to wear gowns in accordance with the prayer of the petition. During vacation the necessary gowns were made for the use of the judges." We are glad to see the extension of this custom among our neighbours to the south, and it is evident from the voice of the legal press that the old ultra-democratic idea of extreme simplicity, verging on indecorum, in court procedure, is very properly on the wane. A certain amount of form is not at all inconsistent with natural dignity, but on the contrary is conducive to its assertion. The ceremonies at the opening

of the court above referred to were more elaborate than any we know of in Canada. It may be true, as the apostles of simplicity assert, that Charlemagne administered justice sitting under an oak, but if he did we may feel sure he was surrounded by the serried ranks of his victorious legions while so doing.

THE MADRAS LAW JOURNAL.

The Madras Law Journal, no. viii, of vol. 1, is the latest addition to our exchange list. It is edited by Messrs. Rai Bahadoor S. Ramasami, M. A., B. L., and the Hon. C. Sankara Nair, B. A., B. L., assisted by two other Indian gentlemen. The contents comprise leading articles, critical notes, reviews, reports of cases, "miscellaneous" and, the most attractive feature to us, very interesting translations from Indian legists, which must prove of no little value to the profession and public in India. We trust that the editors will meet with that measure of support which they are entitled to, and we wish our new contemporary a prosperous future in the ever-widening field of legal journalism.

The publisher has also done his work well. *The Madras Law Journal* presents an attractive appearance and is of a very convenient size.

NEW BOOKS AT THE LIBRARY.

The following books have been added to the Law Society's library:

Rogers on Elections, 2 Vols., 15th edition, 1890.

Leake's Digest of Property in Land, 1874.

Goddard on Easements, 4th edition, 1891.

Starkie on Slander and Libel, 5th edition, 1891.

Godefroi on Trusts and Trustees, 2nd edition, 1891.

Roscoes Nisi Prius Evidence, 2 Vols., 16th edition, 1891.

FLOTSAM AND JETSAM.

THE LEGAL PROFESSION IN THE COLONIES.

Mr. Uttley writes in *The Law Journal* as follows:

Lawyers in the colonies do not find matters so easy as is reasonable, considering that there are local laws. In Canada, the professions of barrister and solicitor are generally combined, and legal firms usually consist of a partnership, in which one of the members devotes himself to advocacy. In Ontario, a barrister belonging to an English Inn has no further examination to pass, but a solicitor must serve under contract for a year with a local solicitor. In Quebec, all lawyers are called advocates, and no one can practise without having passed the local examination; and further, as the law is mostly French, its practice necessitates a knowledge of the French language. In Manitoba, an examination has to be passed in local law, though there is a clause in the local act which seems to repeal this necessity as to the local knowledge in the case of barristers. In the North-West Territories, a British qualification is held to be sufficient, but in British Columbia, a local examination and residence are essential, except in the case of such as hold the degree of D.C.L. or LL.B. In Prince Edward Island, a lawyer must have at least a year's residence in the colony, and submit to examination in local law if the authorities think fit. In New Brunswick, the solicitor must have served a local solicitor for a year. In Nova Scotia, a barrister can practise with a British qualification only, but a solicitor must pass an examination after serving a clerkship of four years. In New South Wales, a barrister of a British Inn is admitted without examination on a motion made in Court in that behalf, and a solicitor from the Old Country can practise without examination after a residence of three months. In Victoria, the conditions are the same, and application must be made to the Court in the same way. The call fee for barristers is fifty guineas, for solicitors the admission fee is forty guineas. In South Australia, the fee in both cases is ten guineas and a three months' residence is all that is necessary. In Queensland, the fee is also ten guineas, and there is no distinction between barristers and solicitors, the only peculiar condition being that the applicant must have two householders as a reference and advertise his application in the newspapers. In Western Australia, a lawyer must reside for at least six months in the colony, and then give four months' notice of his intention to apply for permission to practise. The fee is 10 pounds. In Tasmania, all that is necessary is for the candidate to pay twenty guineas. In New Zealand, the candidate must pass an examination in law, including the

law of New Zealand in so far as it differs from the law of England; but should he be fortunate enough to be an LL.B., his examination will consist only of matters concerning the local law. In the South African colonies, no examinations are needful; in fact nothing is required with a British qualification but fees.

THE LAW OFFICERS' FEES.

A return has been issued to-day of the amount paid by the Treasury to the Attorney-General and Solicitor-General of England, and the Scotch and Irish law officers. From this it appears that the Attorney-General, in addition to his salary of £7,000, received as fees for contentious business in 1887-88, £4,655; 1888-89, £5,014; 1889-90, £2,179; 1890-91, £2,782. The Solicitor-General received, in addition to his salary of £6,000, fees as follows: 1887-88, £3,779; 1888-89, £5,056; 1889-90, £2,300; 1890-91, £2,-044. The Lord Advocate of Scotland received in addition to his salary of £3,279.10, fees ranging for the year from £47 to £89 for non-contentious business, and from £137 to £547 for contentious business. The Solicitor-General for Scotland, with a salary of £955, received annually as fees for contentious business, sums ranging from £135 to £421, and for non-contentious business, from £19 to £39. The fees of the Attorney-General for Ireland, whose salary is £5,000, ranged from £989 to £1,722; and those of the Solicitor General for Ireland, whose salary is £2,000, ranged from £127 to £789.—*The Law Journal.*

THE "MANNERS" OF MR. JUSTICE WRIGHT.

The *Scottish Law Review* has the following on the above judge:

The description of Mr. Justice Wright is that of *Vanity Fair*; and though its letterpress may be taken, like its cartoon, to be more or less of a caricature, and not to be read quite literally, it at all events shows that "manners" attract as much attention in the case of legal personages as their learning. It was the manners, for instance, of Mr. Justice Lawrence, said everybody on his appointment, which would excuse some lack of

erudition; and so it is the manners of Mr. Justice Wright that are set off against his admittedly superior qualifications as a lawyer. "He is now," says *Vanity Fair*, "a judge of six months' standing, unpolished in manner, abrupt in speech, and full of superciliousness, as apparently a good Radical should be. He sat for sometime in Chambers, and the junior bar called up memories of Mr. Justice Field. He now sits in court and treats with a foolish air of superiority, men who often led him at the bar. Yet he is not too old to learn that something more is needed in an English judge than mere legal learning, and it may therefore be hoped that he will try to mend his ways. His faults are only on the surface, but they are earning for this little judge very grave dislike."

BRIEFS.

WE have received from Mr. Albert McPhillips a copy his "Inaugural Address," delivered on Dec. 1, 1890 before the members of the Winnipeg Law Students Society, which the author has had printed for private distribution. We are very glad to have a copy this address and we trust that Mr. McPhillips will be able to send one to every student in the province; his remarks as to professional ethics are specially worthy of consideration, and the address throughout is in a very happy vein. No one of the Bar has interested himself more in the welfare of the students than Mr. McPhillips. The address is entitled "A cursory view of the Science of Law with outlines of the benefits and the advantages to be derived from Legal Associations."

MR. JAMES G. LISTER, of Sarnia, barrister-at-law, and M. P., has rendered himself famous by his fearless manner of conducting the charges of "boodling," etc. before the Parliamentary Committees which sat during the last session, and has made his name a terror to filchers from the public chest. He deserves the thanks of his fellow countrymen, irrespective of politics, for the fearless stand he took against the offending parties.

While referring to this subject it is but the barest justice towards our Lieut.-Governor to say that a careful perusal of the evidence adduced against him by the James Stewart faction shows that the charges completely failed, in fact suffered a total collapse. Any one reading the report of the proceedings at all impartially could not but completely exonerate the Lieut.-Governor on every charge.

ACCORDING to the Criminal Statistics for 1890, 916 people were convicted in Winnipeg under the Summary Conviction

Act. The city showing the highest ratio in crime is Brantford, Ontario, which had 530 convictions out of a population of 14,280. According to this test the town of St. Jean, P. Q., is the most moral, as it had only 9 convictions out of a population of 5,500.

THE last supplement to the *Canada Gazette* contains the North-West Territories Act, the Act amending the Exchequer Court, the Admiralty Act, and the Act respecting Customs duties and other important statutes.

NEW gas fixtures are being placed in the library, and none too soon, for it was probably the worst lighted place in the city, and the smell from the continually escaping gas was really sickening.

THE profession will be glad to hear that the Chief Justice has almost recovered the use of his injured arm.

THE Benchers of the Law Society of Upper Canada in Convocation have adopted the report of the committee of that body recommending that women be not admitted as students at law.

IT appears from the Toronto papers that a motion was made before Chancellor Boyd on the 21st inst. to disbar Charles E. Pegley, Q.C., of Chatham, for fraud and unprofessional conduct. The application was enlarged for two weeks.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. II. NOVEMBER, 1891. No. 8.

Some Results of the Torrens System.*

In the last number of the *American Law Review* Mr. W. D. Turner, of Boston, under the caption of "Land Transfer and the Registration of Titles," contributes a thoughtful article containing a brief survey of the Torrens System of land transfer and its operation in various countries.

As this subject is one which, very properly, is attracting considerable attention from many of the best conveyancers in the United States, and as we believe that any statement of the practical results of a piece of legislation which has worked such a wonderful and radical change in the history of conveyancing will not be devoid of interest or value, we present our readers with a short statistical summary of what has been accomplished by the Real Property Act of 1885 and subsequent amending or consolidating enactments. We are inclined to believe that the results of the operation of the system, which are now for the first time made public, will surprise not a few of our own Bar as much as they did ourselves.

* We desire to express our thanks to W. E. Macara, Esq., barrister-at-law, District Registrar of the Winnipeg District, and Inspector of Land Titles offices, for the statistics furnished in this article.

But first we wish to say a word in answer to a remark of Mr. Turner's that "the introduction of this system has met with considerable opposition from the legal profession, which has been attributed to selfish motives." If this is the case in all other countries where the system has been introduced, and we do not admit that it is, then the Bar of Manitoba has furnished the exception which proves the rule, for the legal profession of this Province gave a hearty and generous support to the proposed reform, and were very desirous of giving it every opportunity to prove itself to be what it is, a boon to the people of Manitoba.

We shall not devote any space here to a consideration of the system itself, which was introduced into this Province by act mentioned after lengthy correspondence with the authorities of several of the Australian colonies, as its general scope is familiar, doubtless, to all our readers †, but shall proceed to notice some of its practical results.

The Winnipeg office, originally the only office, and having jurisdiction over the whole Province under a Registrar-General, was opened on the 1st July, 1885. By 52 Vic. cap. 16, assented to on March 5, 1889, provision was made for the formation of Land Titles Districts by Order-in-Council, in charge of District Registrars, and the old office of Registrar-General for the whole Province was done away with. We give here various tables of figures showing applications, dealings with lands, and receipts and expenditures for each year since then from 1st July to 1st July following, up to the 30th of June last, except in the case of the fees received by, and the expenditure on account of the various offices, which, of course, must close on the 31st December last, that being the end of the Government fiscal year.

† We would refer such as are not familiar with the act, to "A manual of the Law of Registration of Titles to Real Estate in Manitoba and the North-West Territories," by L. W. Coutlee, Barrister-at-Law. Toronto: Carswell & Co., 1890.

1—Applications :

1st July	1885 to	1st July	1886	- - -		326
" "	1886 to	" "	1887	- -		1,170
" "	1887 to	" "	1888	- - -		1,642
" "	1888 to	" "	1889	- -		1,520
" "	1889 to	" "	1890	- - -		1,502
" "	1890 to	" "	1891	- -		1,811
		Total		- - - -		7,971

It is, of course, necessary in comparing these figures to remember that up to the 31st October, 1889, it was compulsory to bring under the Act all lands the patent for which had issued since the 1st July, 1885, and that during that period the whole Province was subject to the provisions of the Torrens system as regards such lands. Since that date the bringing of land under the new system is entirely optional, and there are still six county registration divisions in the Province in which it is not possible to bring lands under the system, and all dealings with land in those divisions must still take place under the old system of registration as known in Ontario.

2—Registrations of instruments affecting land by way of transfer or mortgage :

1st July	1885 to	1st July	1886	- - -		297
" "	1886 to	" "	1887	- -		683
" "	1887 to	" "	1888	- - -		1,049
" "	1888 to	" "	1889	- -		1,189
" "	1889 to	" "	1890	- - -		1,890
" "	1890 to	" "	1891	- -		2,545
		Total		- . - -		7,653

3—Certificates issued :

1st July	1885 to	1st July	1886	- - -		178
" "	1886 to	" "	1887	- -		1,249
" "	1887 to	" "	1888	- - -		2,029

1st July 1888 to 1st July 1889 - -	1,951
" " 1889 to " " 1890 - - -	2,652
" " 1890 to " " 1891 - -	2,935
Total - - - -	10,994

4—Expenditure of the Land Titles offices since the opening of offices in this Province:

1st July 1885 to 1st July 1886 - -	$ 7918 91
" " 1886 to " " 1887 - -	7384 60
" " 1887 to 30th June, 1887 - -	13,684 45
‡30th June 1888 to 31st December 1888	6,442 36
31st December 1888 to 31st December 1889 -	22,664 80
" " 1889 to " " 1890	44,813 93
Total - - -	$102,909.05

5—Receipts since the opening of the offices:

To June 30th, 1886, General Fees - -	$ 2,209 25
" " " " Assurance Fund -	1,288 89
" " " 1887, General Fees - -	8,016 07
" " " " Assurance Fund -	2,682 85
" " " 1888, General Fees - -	10,909 90
" " " " Assurance Fund -	2,825 75
To December 31st, 1888, General Fees -	5,631 95
" " " " Assurance Fund	1,875 15
" " " 1889, General Fees -	19,458 98
" " " " Assurance Fund	4,560 41
" " " 1890, General Fees -	50,919 31
" " " " Assurance Fund	7,474 82
Total - - -	$ 117,853.33

In order to make up the full amount now to the credit of the Assurance Fund, $681.94 interest should be added.

In explanation of these figures for expenditure it

‡In 1888, upon the present Government coming into power, the fiscal year was changed so as to make it end on the 31st December.

should be noted that for the first year the expenditure includes the cost of opening the Winnipeg office, and the expenditure for 1889, and a portion of 1890, includes the cost of opening the other three offices in the Province, but notwithstanding the expenses on this account, which are added to the expenditure of 1890, there was a surplus during that year, in excess of the amount to the credit of the Assurance Fund for that year, of over $6,000, so that the offices are more than self-sustaining, and there is now a revenue to the Government.

It is somewhat difficult to arrive at an estimate of the value of the land brought under the new system throughout the Province, but calculating it from the amount now to the credit of the Assurance Fund, the total value of the land, as given by the applicants themselves,—which, of course, is always a low valuation, as the fees are graded according to the value—is over $15,000,000.

The safety and efficiency of the system may be demonstrated by the fact that though it has been in operation over six years, yet only one action has been brought against the Assurance Fund, and this action was discontinued immediately before going to trial, so that there has as yet been no loss sustained from this fund, and on the 31st December last the amount to its credit was $21,389.81.

Surely nothing could be more encouraging than these results.

We are informed that it is not the policy, at least of the present Government, to continue to have a surplus from these offices after they have been recouped for the expenditure incurred in past years over and above the receipts. The intention is to make receipts and expenditure about as nearly equal as possible, and allow the offices to be merely self-sustaining, and as soon as the funds from time to time exceed that amount, the fees will be proportionately reduced—a policy most creditable to the Gov-

ernment. The only drawback in connection with the operation of the Land Titles Act here is that it does not extend over the whole Province, and this is a fault which is attributable not to the system, but to the pernicious influence of local politicians who, to the detriment of the country at large, have sufficient influence to retain some half dozen registry offices under the old system for the very questionable benefit of certain of their constituents.

DE PRÆSENTI.

THE SCHOOL CASE.

On October 28, ult., the Supreme Court of Canada gave judgment in the case of *Barrett* v. *City of Winnipeg*, generally known as the School Case, unanimously overruling the judgment of the Full Court of Queen's Bench of this Province, and quashing the by-laws of the city of Winnipeg complained of by the plaintiff. The effect of this decision is that the Supreme Court holds that our Roman Catholic countrymen are entitled to separate schools in this Province. The judges who composed the court were Hon. Sir W. J. Ritchie, C. J.; the Hon. Messrs. Strong, Fournier, Taschereau and Patterson, JJ. We give the judgments of the English Judges in our reports. Those of Taschereau and Fournier, J J. have not given to the reporters as yet. Mr. Justice Gwynne was not present at the hearing. So far, the judicial array is six to three on the question, but of these six it may be, as has been alleged, that at least three have such strong feelings on the religious aspect of the great issue that their minds would unconsciously have

a slight leaning in a certain direction. We do not understand this view to mean the slightest reflection on these honourable and learned gentlemen, but simply that they are human. It is for this very reason that we are glad the case will be heard before the Judicial Committee of the Privy Council at as early a date as possible. It is the only course open under the circumstances, especially as the Dominion will defray the costs to the Roman Catholics. The judgment of Chief Justice Ritchie impresses us rather as an argument in favour of Separate Schools than a judicial finding. Mr. Justice Patterson's is far more satisfactory as a judicial opinion, but is undeniably apologetic in tone, and conveys the idea that it was arrived at after a consideration of matters somewhat extraneous to the statutes which do, or do not, confer the privilege in dispute. We would not be at all surprised to see the finding of the Supreme Court reversed by the Judicial Committee. If Mr. Justice Strong had delivered a separate judgment we feel sure it would have been of much assistance in determining the grave interests at issue in this matter.

While on this subject the attention is naturally directed to the even more celebrated, and, in many points, analagous "New Brunswick School Cases," the first of which is found in the reports as *Ex parte Renaud*, 14 New. Bruns. 273.

This case † came before the New Brunswick courts in February, 1873, on an application for a *certiorari* to remove an assessment for school purposes. The court was composed of Ritchie, C. J., Allen, Weldon, Fisher and Wetmore, JJ. Allen and Weldon, JJ., concurred in the judgment of the Chief Justice discharging the *rule nisi*, and the two other judges delivered each a judgment to a similar effect. *Ex parte Renaud* never went to the

† We have taken most of the following particulars from Todd's "Parliamentary Government in the British Colonies."

Privy Council, as has been lately erroneously asserted, notwithstanding that the Dominion Parliament had granted moneys to defray the costs of an appeal, and that the Commons had declared their opinion that the matter should be brought before the Judicial Committee, for the Executive Council of New Brunswick, on May 19, 1873, addressed a protest to the Governor-General against the unwarranted interference of the Commons. The Governor-General referred the matter to the Secretary of State for the colonies, who in his reply dated June 30, 1873, informed the Governor that the acts being within the powers of the local legislature and in agreement with the general spirit of the Act of Confederation, ought to be allowed to remain in force, and could not constitutionally be interfered with by the House of Commons.

The matter, however, was ultimately brought before the Privy Council at the instance of Mr. Maher, of Portland, N. B., in the case of *Maher* v. *Town of Portland*, who in Hilary Term, 1873, applied for a *rule nisi* to quash an order of assessment of the town council. The court refused the rule and an appeal was brought before the Judicial Committee, which was argued in July, 1874, and judgment was given confirming the decision of tbe court below, without calling upon the respondents, and dismissing the appeal with costs. This case is unreported, but the judgment will be found in *The Times* for July 18, 1874, p. 11; in the Toronto *Globe* for July 31, 1874, and in *Cartwrights' Cases on B. N. A. Act*, Vol. 2, p. 485

HE OF ALBANY AGAIN.

Our flippant friend, he of the *Albany Law Journal*, is once more aroused. Last summer he came forth from the solitudes of Albany and took a hurried tourist trip to Europe to see the world, and while abroad was cruel enough not to allow his contemporaries to experience some slight

relief from his literary attempts, but addressed a series of letters to his own journal, describing his emotions, and inflicted on his readers some most lamentable rhymes.

It is true that he apologized for this ungenerous action in his issue of September 5th, and stated that he arrived home "completely vacuous in mind." We were much concerned on reading this announcement, as we had hoped that an ocean voyage and a glimpse at the great world would have worked some change in his mental condition, or at least afforded him some relief from those disorders under which he has so long laboured, notably rabid Anglophobia and irresponsibility on the question of "Woman's Rights." We nervously awaited developments, and we had not long to wait. *The Scottish Journal of Jurisprudence* took exception to some of his unusually anserous remarks on things British, and in an article entitled "A traveling editor" administered a little paternal castigation to our verdant traveler, which article we reprinted under the same name with a few comments thereon. About the same time our excellent contemporary, *The Central Law Journal*, incurred the hostility of our tourist by some amusing strictures on his laughable efforts to cultivate a literary style, terminating, as they invariably do, in gymnastics of a diverting kind. Goaded by these pleasantries, our traveler in a recent issue attacks all three in his customary frenzied manner, and affords us all not a little amusement.

That the article is wilfully inaccurate in its references to this journal might be inferred from the fact that it was written by one who has the amazing effrontery to state that he could "not get a decent piece of roast beef in London," or his daughter "a pair of five and a half gloves" in that city!

That it is abusive and impertinent may be inferred from the fact that it was written by one who had the

impudence and mendacity to state in the columns of his journal that the "average English husband is a domestic . . . tyrant, who can *commit adultery at pleasure*," and that his wife is a "*poor, weak-spirited slave . . . who rather admires such treatment*"!

That it contains a vicious and jaundiced attack on "Scotch, Canadian and other outlandish periodicals" while in that very issue the tourist unblushingly appropriates nearly *nine columns* from the *Canada Law Journal* is not surprising, because it is by such evidences of a subverted and unbalanced mind that this fantastic one has come to be recognized as the buffoon of the legal press.

We have nothing to say to that part of his article which snarls at the *Central Law Journal*, as that paper is well able to take care of itself, and needs no commendation from us or from others. The rest of his screed, as might be expected from his insolent braggadocio in other matters, is devoted to vulgarly and discordantly blowing the editorial fish-horn in praise of his woeful wares.

Blow not thy trump so loud in thine own praise, O gifted friend! lest it should chance that one who knows thee not, yet hears the din, might step aside and lift the skin, and find beneath thy sorry hide. *Vale!*

LAW STUDENTS' SOCIETY.

We are glad to see that the law students have organized for the present year. The annual meeting was held a few days ago in the offices of the school board in this city, and the attendance was very encouraging. The chair was taken by Mr. George Patterson, and Mr. Mulvey acted as secretary. After ordinary amount of routine business was transacted, the meeting proceeded to the election of officers with the following result:

President, Mr. Frank Mulvey.

Vice-President, Mr. F. L. Davis.

Secretary, Mr. M. B. O'Dell.

It is the intention, we understand, to hold the customary meetings during the winter terms. It is unnecessary for us to point out the advantages that will accrue to the law students, provided a general and hearty interest is taken in the proceedings of the society by them as a body.

AN UNIQUE PRAYER.

In the last issue of *The Virginia Law Journal* is an able rejoinder by Mr. W. B. Pettit to an article of Mr. Pattersons—"Law Reform." Mr. Pettit makes a strong case against hurried and indiscrimate enactments for all sorts of relief to litigants, in the course of which he quotes from our contemporary, as being a fact, the following amusing illustration of a rebuke administered by a well known lawyer to this practice, which has been carried to excess under certain codes:

"The late Matt. H. Carpenter in a case which was litigate in the Courts of Wisconsin for a great number of years, in the prayer for relief, used the following language:

'And that such other orders, regulations, special proceedings, and unheard-of-remedies may be, from time to time, in this action invented, ordered, and had, as the nature of the case may require; and that this plaintiff may, from time to time, and always, (for he never expects to see the end of this action), have such other and further or new and extraordinary relief as the nature of this action may require; and that everybody else may have all the relief that they are entitled to in this action, according to law and according to the decisions of the Supreme Court made or to be made, and that, too, as fully and amply as anybody can hereafter suggest, and as the plaintiff may hereafter have occasion to ask when he sees how this thing works.'"

BRIEFS.

OWING to the lengthy report of the School Case in this number some other matters are held over till our next issue.

THE Grand Jury of the Central Judicial District, sitting at Portage la Prairie, has again put itself on record in favour of its own abolition.

WE ARE requested by the Registrar of the Exchequer Court to state that the sittings of the Court in the Western Provinces have been cancelled for the time being, the cases not being ready for trial.

MR. ELLIOTT ANTHONY has an eloquent appeal in the *Chicago Legal News* for the preservation of the old records of Illinois. It seems incredible that this should not have been attended to long ago by the Government of such a great state. We are glad to see the *Legal News* taking the matter up.

ON the ninth instant the trial of the election petition against Mr. Robert Watson, M.P. for Marquette, took place at Portage la Prairie, before Hon. Mr. Justice Dubuc and Hon. Mr. Justice Bain, who went from here, with Mr. Prothonotary Walker, to hold the court. No evidence being adduced on behalf of the petitioner the case was dismissed with costs.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. II. DECEMBER, 1891. No. 9.

The Sheriffs of Assiniboia.

(*Concluded.*)

Alexander Ross, Sheriff of Assiniboia, of whose life we gave certain particulars in our last paper on this subject, had, while engaged in the fur trade in the service of either Astor's or the North-West Company, taken to himself an Indian wife in the person of the daughter of an Oregon chief, who bore him a large family, of whom we give the following particulars:

1. Alexander, born in British Columbia, died a young man, unmarried.

2. Margaret, married Hugh Matheson of Kildonan and had issue.

3. Isabella, married first, William Gunn, son of the late Hon. Donald Gunn, of St. Andrews; and, second, James Green, and had issue.

4. Mary, married the Rev. George Flett of Riding Mountain, Presbyterian missionary, no issue surviving.

5. William, J. P., Sheriff of Assiniboia. Born in the Rocky Mountains, July 24, 1826, died at Red River May 4, 1856. Married Jemima MacKenzie, 4th and youngest

daughter of Roderick MacKenzie, Esq., Jr., Chief Trader of the Hudson's Bay Company, and had issue (1) William Roderick, of Armstrong's Point, who married Jemima, youngest daughter of Donald Matheson, of Kildonan, by whom he has three children, Helen, Louise and Roderick Arthur; (2) Margaret, married Walter J. T. James, and has issue.

6. Anne, died unmarried.

7. Henrietta, married the late well-known and highly respected Reverend John Black, D. D., of Kildonan, and has issue.

8. Sarah, married James Cunninghan, of Headingly, and has issue.

9. James, J. P., Sheriff of Assiniboia, married Margaret Smith of Toronto and had surviving issue (1) Herbert, now of Winnipeg; (2) Henrietta, and (3) Carrie, both living with their mother in Toronto.

10. Jemima, married William Coldwell, of Winnipeg, and has issue, a son and a daughter. Mr. Coldwell is very widely known as one of the two first proprietors and editors of the *Nor'-Wester*, the pioneer newspaper of Rupert's Land.

11. Alexander "W.", born in 1842, long after the death of his eldest brother; married Catherine, daughter of Donald Murray, of Kildonan, and had issue, (1) Alexander Donald, and (2) Edward.

Alexander Ross, senior, resigned his office some time in 1851, and was succeeded therein, as before stated, by his eldest surviving son William, who died on the 4th May, 1856, predeceasing his father, who followed him to the grave on October 23 of the same year, dying after a most eventful life at his comfortable and historic old home "Colony Gardens," on the banks of Red River near Fort Garry, now in the city of Winnipeg. He was buried in the churchyard at Kildonan.

The salary* attached to the offices of sheriff and governor of the gaol, which were combined, at this time was £60 per annum, though it was raised to £100 in 1869. Of course, however, it must be remembered that the duties of the office were very light, and mode of life primitive in the colony at that time.

On the death of W. Ross he was succeeded by Mr. John Bunn, M. D., J. P., who summoned his first jury for the Quarterly Court which sat on November 20, 1856. As Mr. Bunn was afterwards Acting-Recorder of Rupert's Land, we shall hereafter consider him in another series of papers in connection with that office. Sheriff Bunn died at Red River on May 31, 1861, and Mr. James Ross, J. P., son of Sheriff Alexander Ross, and brother of Sheriff W. Ross, was appointed to succeed him.

James Ross, born at Red River in 1835, was, according to Hargrave,† "a distinguished scholar," of St. John's College, Red River, and afterwards "went through a very creditable academical career at the University at Toronto," graduating in 1857 with two gold medals. On his return to Red River he joined forces with Mr. William Coldwell in the editorship and proprietorship of the *Nor'-Wester*, and retained his connection with that journal till 1864. Among the more noticeable of his contributions to the *Nor'-Wester* is a "History of the Red River Settlement," which appeared in the form of a series of articles, and contains a great deal of valuable information not elsewhere to be found, evincing not a little literary ability, but unfortunately betraying occasionally the feel-

* Hargrave, *Red River*, p. 256, says that the joint offices of sheriff and governor of the gaol yielded only £30 per annum. This is an error, as Article 50, of the Laws of Assiniboia April 11, 1862, provided that the salary of James Ross as governor of the gaol alone should be "thirty pounds a year."

† *Red River*, p. 146; Montreal, 1871.

ings of the partizan rather than the historian. The first of these articles appeared in February, 1861.

Mr. Ross' shrievalty was a short and stormy one. The Council of Assiniboia at a meeting held at Fort Garry on October 30, 1862, presided over by Gov. Dallas, invited the settlers to sign a petition to the colonial secretary asking for troops to take the place of the military, who had been withdrawn. Ross, actuated, as he claimed, by a desire for the best interests of the people, circulated another petition which, while it asked for troops, contained disparaging statements on the rule of the Hudson's Bay Company. Meetings were held by both parties, and the *Nor'-Wester* was not silent, the consequence being that Mr. James Ross was, by order of the full council, made on November 25, 1862, dismissed from the offices of sheriff, governor of the gaol and postmaster. A demonstration was got up in his favour by his adherents, who presented him with an address on December 12 of the same year. During the Riel Rebellion in 1869-70 he was one of the English-speaking delegates to the conventions held at that time. Riel appointed him "Chief Justice" of the rebel Provisional Government, a short-lived and very questionable honour, and one which Mr. Ross had no inclination for, and never attempted to make use of. That "king for a day," Riel, however, was very prodigal of his appointments, civil, military and legal, many of which, this among the number, were not openly refused by the recipients simply because they deemed it wise to humour the "potentate" as a matter of policy. Ross died at the family homestead, "Colony Gardens" on September 23, 1871, leaving behind him a reputation as an upright and able man. His property, known as the James Ross estate, subsequently became of great value in the "boom" days of Winnipeg, and, differing in this particular from most of the estates of the old settlers, was disposed of in a way which benefited his family very materially.

Henry McKenny, the last of the sheriffs of Assiniboia, was born in the county of Essex, Ontario, about 1826, and there married Miss Lucy Stockwell. He came to Red River in 1859, and entered into business on a large scale with Dr. Schultz, now the Hon. Lieut.-Governor of this Province, under the firm name of McKenny & Co., as general traders. On the dismissal of James Ross he was appointed to the offices of sheriff and governor of the gaol. According to Hargrave,‡ McKenny & Co. are entitled to be considered as the practical founders of the then village of Winnipeg, as distinguished from Fort Garry and the settlement at large, for he states that in the summer of 1862 they "erected in a perfectly isolated spot" a long, two-storey, trading establishment "on the highway at the spot where the Assiniboine and Red River tracks meet, close to the boundary of the Hudson's Bay Company's reserve." This example was speedily followed by others, and the land rose in value from the original price of 7s. 6d. an acre to £25 sterling the square chain. Mr. McKenny appears to have endeavoured to provide his officers with business, as he became involved in litigation with his rivals in trade, and later with his former partner after the dissolution of the firm in the autumn of 1864, of which proceedings a full account will be found in Mr. Hargrave's work already referred to. These actions did not, however, keep the court as well supplied with business as might be expected, for at the Quarterly Court held in August, 1864 "the assize was a 'maiden' one, and gave an opportunity to Mr. Sheriff McKenny of presenting the presiding judge with a pair of white gloves, along with a neat speech of his own; 'in accordance,' said the sheriff, 'with a time-honored usage on such occasions in English courts.'" § The last record of an official act of Mr. McKenny is under date of November 19, 1869, and in

‡ *Red River*, p. 307, *et seq.*
§ *Ibid.*, 339.

1870 he removed to Pembina, Dakota, and thence to the Pacific coast, dying in Oregon several years ago.

The collapse of the authority of the Hudson's Bay Company consequent upon the capture of Fort Garry by the insurgents under Louis Riel, with whom McKenny, by the way, strongly sympathised, swept off the stage the Sheriffs of Assiniboia, whose time-honoured office disappeared in the new order of things, like most of the other institutions of the patriarchal and not unworthy government of the Old Régime.

Though properly beyond the scope of our paper, it may not be out of place to add that Mr. John Sutherland, of Kildonan, now the Hon. John Sutherland, Senator, was the first sheriff of the Province of Manitoba, and as such attended the first Quarterly Court after the union, which was held by Mr. Recorder Johnson at the court house on Main Street, Winnipeg, on Nov. 17, 1870. Mr. Sutherland's formal appointment was not gazetted till May 29, 1871, and he shortly after resigned it, on attaining to his present senatorship. Edward Armstrong was made sheriff in his stead on December 14, 1871, and remained in office till 1876, when he resigned, and was succeeded by the Hon. Colin Inkster, late President and Speaker of the Executive Council, who was gazetted on February 7, 1876 as "High Sheriff of Manitoba," which office he continued to ably fill till 1881. In that year, the Province having increased greatly in population, it became necessary to divide it, by the Act 44 Vic. Cap. 37, into three Judicial Districts, the Eastern, Central and Western. Mr. Inkster was appointed to the Eastern and most important of the three, Stephen Clement, Esq., of Brandon, to the Western District, where he still retains his office, and John James Setter to the Central District. We regret to say that it

became necessary to dismiss Mr. Setter some two years ago, and he was succeeded by Mr. Alexander McLean, who was accidentally killed on July 22 last, and Mr. John J. McRobbie has been appointed his successor *pro tem.*

DE PRÆSENTI.

THE CHIEF JUSTICE'S PORTRAIT.

The portrait of the Honourable Thomas Wardlaw Taylor, the present (fourth) Chief Justice of this Province, was hung in the assize court room a day or so before the opening of Michaelmas Term. The artist is Mr. G. T. Berthon, of Toronto, who has had the honour of painting many of the most distinguished Canadian jurists. We venture on a short description of the painting for the benefit of those of our readers who have not seen it and who are doubtless interested in the matter.

The figure is at least life size and represents the Chief Justice in gown, bands, knee-breeches, silk stockings and silver buckles, standing with his face turned slightly towards his right, his left hand resting on a volume on a table hard by, on which also is laid his three cornered hat. The pose of the figure is slightly strained, verging perhaps on the heroic, and scarcely does justice to the subject. The head is a trifle too small and the right hand especially lacks vitality. At the same time the canvas lights up well and produces a good effect, being decidedly, in our opinion, the most artistic of the three portraits of the Chief Justices, and though we have stated the defects of the portrait, yet it will bear inspection, and after each consideration of it one likes it better.

It is greatly to be regretted that a prejudice was created against the pairting by the Portrait Committee most thoughtlessly allowing it to be displayed in the window of a picture framer, before it was sent to the court house, where it was subjected to minute and unfair inspection under a glaring electric light, which would have destroyed the effect of the best canvas ever touched by brush. The framer should not have been allowed to show the picture at all, and its exhibition was regretable and contrary to all precedent.

On the first day of Term, a number of the bar repaired to the court house thinking that the benchers, on behalf of the Law Society, would have taken advantage of the occasion to make some suitable remarks to the Chief Justice, but not a bencher was to be seen at the opening of court! A number of the bar present, feeling that the event should not be passed over, requested Mr. Howell, Q.C., as a leader of the bar, to address the Chief Justice on their and his own behalf, which he did, expressing in complimentary language the gratification which all experienced on the completion of the portrait while his lordship was yet in his full force and vigour, to which the Chief Justice replied in suitable terms.

Personally we are more than pleased at the event, and extend our hearty congratulations to the learned judge, trusting that he may long be spared for the fulfilment of the duties of his high office.

DELAYS IN SUPREME COURT JUDGMENTS.

The case of *Stephens* v. *McArthur*, involving questions which affect the validity of every chattel mortgage and bill of sale in the whole of North-West Canada, was argued before the Supreme Court in January, 1890. After an inexplicable delay, very embarrassing to the whole business community in its results, as no member of

the profession could advise his client as to the state of the law in the meantime, judgment was finally delivered on the sixteenth of November last. The Law Society of Manitoba, deeming the case of sufficient importance, telegraphed to Ottawa to the Registrar of the Supreme Court for copies of the judgments, and made arrangements to have the same printed and circulated at once among the profession through the medium of this journal. Will it be credited that the Supreme Court Reporter telegraphed back and wrote later, that the judge who delivered the judgment of the court refused to let it be even copied until it was printed—in the regular reports, presumably? Now in the ordinary course this means a long and perhaps unavoidable delay, for the last case in the number of the Supreme Court Reports lately received is six months old. We think that there must be some misunderstanding of instructions in this matter, as we can scarcely believe that the learned judge would have intentionally acted in a way which, quite outside of a very great want of consideration to the bar and the Law Society, practically tends to block the administration of justice. We give prominence to this matter trusting that we will be enabled to furnish some explanation to our readers, amongst whom a good deal of plain speaking has been indulged in regarding this regrettable occurrence. In the reports will be found a precis of this judgment.

THE SUPREME COURT AND THE SCHOOL CASE.

Consequent upon the success of the Roman Catholics the English Church has succeeded in its application to have it declared that it also has a right to separate schools, and it is reported that the Presbyterian body will shortly follow suit. Truly we may well say with the immortal Ko-Ko when struggling with a legal problem :

Here's a state of things!

It looks as though the above three denominations or sects are going to "run their own shows" while the comparatively small balance of the population made up of Methodists, Baptists, Congregationalists, Mennonites, Salvation Army warriors, Free-Thinkers, Jews, Pagans and Infidels have to shoulder the burden of supporting the public schools. The most cursory examination of the judgments of the Chief Justice and Mr. Justice Patterson reveals the fact that they differ from each other on very essential points, and though they arrive at almost the same conclusions, yet the reasons on which these conclusions are based are curiously opposite. To illustrate our point we have thrown into parallel columns a few of the passages in each judgment which show the way in which the positive statements of Sir William Ritchie clash with the almost apologetic expressions of the learned puisne judge:

The Chief Justice:	Mr. Justice Patterson:
(1) Read in the light of considerations such as these, must we not conclude that the Legislature *well weighed its language, and intended that every word it used should have force and effect.*	Precision and accuracy are not characteristics of the clause as a whole, and we cannot properly single out these particular words "by practice" for very critical or pedantic treatment.
(2) The words used, in my opinion, are of no doubtful import, but are, on the contrary, *plain, certain and unambiguous*, and must be read in their ordinary grammatical sense.	It (the section in question) is not an example of very precise or accurate drafting. The first question for us to decide is what the added words "or practice" mean, or whether they also mean nothing.
(3) The literal meaning *is the only meaning the words are capable of* . . . If the literal meaning is not to prevail I have yet to hear what other meaning is to be attached to the words "or practice."	It is arguable . . . that the word "by" must have the same force when understood in the one place as when expressed in the other, leading to the conclusion that, inasmuch as no rights or privileges in respect of denominational schools had been acquired in

the territory in that manner, the clause in question is wholly inoperative.

(4) It cannot be said that the words used do not harmonize with the subject of the enactment and the object which I think the legislature had in view. . . . *how could they have used more expressive words to indicate their intention.*

Precision and accuracy are not characterists of the clause as a whole, and we cannot properly single out . . . etc., *supra*, (1).

The Manitoba act did not assume to preserve that right merely as an abstract and theoretical right, but it did so in favour of such classes of persons as at the union were practically exercising it. *If the construction seems to do any violence to the language of the clause, it is only by treating the word "by" where it is understood before the word "practice" as not having precisely the same force as when expressed before the word "law."*

These parallels might be extended, but what we have given will sufficiently illustrate our meaning.

Our attention has been called by one well known in the legal world to the following point which appears to us to merit the most serious consideration, and which, so far as we know, has not been taken. Admitting that the 22nd section of the Manitoba act gave to a certain "class of persons" the right or privilege to maintain denominational schools which by law or practice it had at the union, it is submitted that the utmost protection intended by that act extends only to denominational schools existing at the date of the union, *i. e.*, actually *in esse*, at that date and no farther. Such schools, locally identified, are to be exempt from prejudicial affection by the legislature of the then created province, but not any schools erected or established after the union. Also, how can the Act affect the added territory?

It will of course be remembered that the Privy Council is sometimes influenced by considerations of political expediency in advising Her Majesty, and may not adhere to

the purely legal aspect of the dispute. In an article from the *Law Journal* on the secrecy of the judgments of the Privy Council, which we reproduce elsewhere, this point is, coincidently, referred to.

SIR MATTHEW BEGBIE IN HOT WATER.

It is a matter of deep regret to us that the Chief Justice of British Columbia should persist in bringing himself before the people of that Province in an unenviable light, for the very fact of a crowded indignation meeting being recently held to protest against the utterances of the Chief Justice from the bench in a recent criminal case, is calculated to bring the judiciary into disrepute, and to shake public confidence in the administration of justice. We have neither the space or the inclination to reproduce here the fierce speeches and grave charges made against the judge by, according to the * *Mail*, "all the leading clergymen" in the town, but we hope that Sir Matthew will in future endeavour to curb his tongue, while on the bench at any rate, for if the *Mail's* report be trustworthy his utterances were most improper, and if he has got so callous that he personally does not care for the opinion of the public or the press, then let him at least do so out of respect to the bench of Canada at large, and British Columbia in particular, not to say the whole legal profession, who lament such exhibitions of judicial impropriety.

SECRECY IN PRIVY COUNCIL JUDGMENTS.

It is not often, we imagine, that Sir Walter Phillimore and Lord Grimthorpe find themselves in agreement. At such a happy conjunction the strong presumption surely is that they are both right. In a letter to the *Times* on Wednesday, which we reprint in another column, Sir W. Phillimore has successfully attacked, by means of numerous pre-

*A whole column is devoted to an account of these proceedings in the *Mail* for the 2nd inst..

cedents, the doctrine promulgated by Lord Cairns against Sir Fitzroy Kelly, and recently supported by Lord Selborne, of the obligation of secrecy in Privy Council judgments. There are strong and obvious reasons against the present practice. In the first place, there is the appearance where there perhaps is not the reality of unanimity. The judgement may not be the "judgment of their lordships'," but that of three weak judges as against that of two strong ones. Then there is an inevitable loss of individuality in a common judgment, and the arguments and considerations which may actuate a vigorous-minded judge are not likely to emerge in a decision framed to suit the opinions of the whole or of the majority. There is a temptation to acquiesce in the language of some one member of the committee, and perhaps in his ideas, on the part of indolent men, who satisfy themselves by simply coming to a conclusion on the matter in hand, without careful analysis of argument. Again, law is not final; it is, and ought to be, subject to the development of knowledge and sentiment. A decision of the Privy Council or the House of Lords may be undermined and its effect overruled in progress of time. Improvement can best be effected when each man's contribution to the progressive movement is made known to the world. There is also an argument of a technical character. The decisions of the Privy Council are not strictly judgments, but advice tendered to Her Majesty. Cases are imaginable in which it might be expedient for the Queen—especially in constitutional questions arising in India or the Colonies—to disregard the advice so given. Such a step would be clearly made less dangerous if it were in accordance with the opinion of a minority of the council whose ability and reputation were higher than those of the majority.—*Law Journal, Oct. 31.*

FLOTSAM AND JETSAM.

RED RIVER BAR ASSOCIATION.

We were lately presented with a quaint pamphlet of eleven pages, about 3 x 4 inches in size, printed at Fargo, then (1880) in Dakota Territory, U. S. A., and being the constitution of the Red River Bar Association. As this is the only copy we have seen, we think it well worthy of reproduction:

CONSTITUTION AND BY-LAWS

OF THE

RED RIVER BAR ASSOCIATION.

At a meeting of the Association held for that purpose at the office of Twomey & Francis, on the 13th day of December, a quorum being present, the following constitution and by-laws were adopted:

ARTICLE I.

The name of this Association shall be the Red River Bar Association.

ARTICLE II.

The officers of this Association shall be a President, Vice-President, Secretary and Treasurer, whose term of office shall be for the term of one year, and who shall be elected by ballot at the annual meetings of the Association.

ARTICLE III.

The annual meeting of the Association shall be held on the third Wednesday in October in each year. The regular meetings shall be held on the third Wednesday of each month. Special meetings may be held at any time upon the call of the Secretary, who shall issue such call only by order of the President or any three members.

ARTICLE IV.

Any duly admitted attorney engaged in active practice, located in the valley of the Red River of the North, may be elected a member of the Association by a two-thirds vote of the members present at any regular meeting, and after election shall, by signing the constitution and by-laws, become entitled to all the rights and privileges of membership.

BY-LAWS.

SECTION 1. It shall be the duty of the President, and in his absence the Vice-President, to preside at all meetings; of the Secretary, to keep a record of the proceedings of the Association, and to keep and care for all the books and records of the same; of the Treasurer, to collect and keep all funds of the Association, and pay the same out only on the order of the secretary attested by the President, in accordance with either established rules or special authorization of the Association; and of all the officers collectively, as an executive committee, to have and take the general oversight and charge of the interests of the Association.

SEC. 2. A fee bill shall be adopted by the Association, by which all the members shall be bound; its adoption or subsequent change shall require a majority vote of all the members of the Association.

SEC. 3. Such assessment shall be levied from time to time by the Executive Committee as they shall find necessary to defray such expenses as may be incurred by the action of the Association.

SEC. 4. Seven members shall constitute a quorum for the transaction of business.

SEC. 5. Conviction of the violation of the provisions of the fee bill shall be cause for punishment as follows: For first offence, a reprimand of the President in open meeting of the Association; for second offence, a fine of ten dollars, the non-payment of which to the Treasurer within five days after the same is imposed, shall be cause for expulsion, and for the third offence, expulsion from the Association.

SEC. 6. The following shall be standing committees of the Association, and shall be appointed by the President at the first regular meeting after the annual election of officers, which said committees shall hold office until their successors are appointed, viz.:

A committee on laws, to consist of three members; a committee on blanks to consist of three members; a committee on printing, to consist of three members; a committee on grievances, to consist of three members.

SEC. 7. This constitution and these by-laws may be amended or changed at any regular meeting of the Association by a two-thirds vote of the members present, provided a notice stating the general effect of such amendment or change shall be given at some previous regular meeting of the Association.

FEE BILL.

RETAINER, CIVIL SUIT IN DISTRICT COURT.

When amount claimed is $150 or under	$ 15 00
When amount claimed is $150 to $250	20 00

When amount claimed is $350 to $500	25 00
When amount claimed is $500 to $750	30 00
When amount claimed is $750 to $1,000	50 00
When amount claimed is $1,000 to $1,500	75 00
Above $1,500, each addititional thousand	10 00
In case of attachment, garnishment or replevin, in addition to above	10 00
In all actions in the nature of equity proceedings, not less than	40 00
For making or opposing any motion	10 00
Preparing and arguing a demurrer	10 00
Preparing and arguing a demurrer which determines the case, from $25 to	100 00

ENTRY OF JUDGMENT BY DEFAULT.

Where amount is $250 and under	10 00
Where amount is over $250	15 00

TRIAL OF AN ISSUE IN COURT OR BY REFERER.

First day	25 00
Each additional day	15 00

FOR FORECLOSING MORTGAGE BY ADVERTISEMENT, MORTGAGEE BUYING PROPERTY.

When amount secured is $500 or under	$ 25 00
When amount secured is $500 to $1,000	50 00
When amount secured is $1,000 to $5,000	75 00
When amount secured is $5,000 to $10,000	100 00
When amount secured is $10,00 and upward	200 00
And in no case less than the amount stipulated in the mortgage.	
For preparing interrogatories and securing issuance of commission to take deposition	10 00
Drawing deed, mortgage, power of attorney or contract, when blank is used	2 00
Chattel mortgage or bill of sale, short form	1 50
If written out	5 00
Drawing articles of copartnership	10 00
Drawing mechanic's lien, notice or affidavit	5 00
Drawing deed of assignment for benefit of credttors	30 00
On miscellaneous collections, amounts to $500, 10 per cent.	
Ditto, amounts in excess of $500 to $2,500, 5 per cent.	
Ditto, amounts in excess of $2,500, 3 per cent.	
And in no case less than	2 00
On lines of collections received before due, 5 per cent.	

RETAINER IN CRIMINAL CASES.

Misdemeanor, not less than	$ 25 00
When penalty for crime with which client is charged is fine or imprisonment not to exceed three years	50 00

When penalty is imprisonment not to exceed 5 years	100 00
Penalty not to exceed 7 years	150 00
Penalty not to exceed 10 years	200 00
Penalty death or life imprisonment	250 00

LAND OFFICE CASES.

Retainer	15 00
Taking testimony, per day	10 00
Making argument	10 00
Taking appeal to Commissioner, without argument	10 00
Taking appeal to Secretary of Interior, without argument	10 00
Trial of case in Justice Court, civil or criminal	10 00
Taking appeal from Justice Oourt	10 00
Fee for advice from $2 to	25 00
Drawing will, not less than	10 00
Divorce case, not less than	75 00
For advice on abstract of title	5 00
For advice on abstract of title, written opinion	10 00
General retainer by the year	50 00

We, the undersigned individuals and firms, hereby approve the foregoing fee bill, and agree to abide by the same.

TWOMEY & FRANCIS,	S. G. COMSTOCK,
BURNHAM & GOULD,	JOHN A. STOYELL,
CHAS. S. TORKELSON,	JOHN D. BENTON,
GEO. I. FOSTER,	HORACE AUSTIN,
S. G. ROBERTS,	HENRY D. HOBSON,
JACOB LOWELL, Jr.	W. F. BALL,
H. F. MILLER,	STOYELL & BALL,
WM. B. McCONNELL,	BRIGGS & ELDERS.

AN IMPARTIAL JUSTICE.

The following good, but "tall," yarn we take from the Chicago *Legal Adviser* which credits it to the Detroit *Free Press*:—

I was new in the business and as ambitious as Cæsar. I would tackle anything, and like most lawyers in the early stages I had no trouble in convincing myself that my client was right and the other fellow a rascal. An old granger near the city in which I first swung my shingle to to breeze was always in trouble with neighbors, and was a rich mark for lawyers. He gathered in some cattle that had broken into the highway from the field of a farmer

near by, stabled them, and refused to give them up unless paid an exorbitant price for damages that were never committed.

A writ of replevin was issued. I took the case for the owner of the cattle, and early one morning drove out to an office of a German justice of the peace. His temple of justice was an old rattletrap of a building with no ceiling, but stringers across where the clapboards terminated and the peaked roof began. The occupants of these stringers kept all below busily dodging tobacco juice. The jury was made up of a lot of honest soil tillers, whose faces were as sphinxlike as that of a professional gambler. His honour occupied a very uncertain chair that had earned an honorable retirement, and kept his owl-like wisdom in activity by constantly whittling on a hard-wood broomstick.

Pitted against me were two old lawyers, and it was their pleasure to constantly utilize my youthfulness in impairing my standing with the jury. I was full of fight, but what almost drove me from the shanty was the fact that the squire ruled dead against me every time. I argued, pleaded, read authorities, kicked, upbraided, but the whittling representative of the blind goddess never turned a hair. He would simply say: "Don't got oxcited young man. I vos der shudge. Yust go ahead mid der case. Shustice is shustice, and don't you forgedt it."

The two old attorneys were not slow to catch on, and they took the wildest liberties, disregarding everything and chuckling at every objection I made. I was on the verge of insanity, and my client looked like a thundercloud rampant. Dinner time came, and the squire had a spread for jurors, lawyers, and litigants. My opponents were in high feather, while my food nearly chocked me.

After eating I handed the 'squire a cigar and we walked out into the orchard, where I upbraided him for the course he had pursued.

"Young man,,' he said, "vot is der reason mit you? I know vot vas law und yustice und equity. Give efery man der same chance. In der forenoon I let those two lawyers have der vhay. Now it vos your durn. Go in. I pelieve in fair play. I don't gare how much dose fellows object, its your durn."

Did I go in? I claimed everything and conceded nothing. I rode roughshod over the rules of testimony and the two old lawyers. I had them wild, pawing the air and frothing at the mouth. The 'squire was deaf to their appeals and blind to their agony. "I gif half a day apiece," was his sole justification. I won in a walk. The other side wanted to appeal, but their client was so mad that two oldtimers should be so ignominiously beaten by a youug lawyer that he settled then and there, hired me by the year, and gave me my first good start.

BRIEFS.

A NUMBER of the bar have adopted the orthodox bands as worn by the English bench and bar and by Canadian judges with few exceptions. We are glad to see the nondescript white tie discarded, as it is a meaningless and unjustifiable innovation on the traditionary costume of the bar. The Honble. Chief Justice of this Province has been pleased to express his "hearty approval" of this movement.

THE last addition to the list of licensed conveyancers is Mr. Theophane Bertrand, of St. Boniface. We trust that the County Court Judges are doing their duty in this

matter in seeing that the provisions of the statute, as to examining candidates, are faithfully carried out.

THE following gentlemen were called to the bar on the first day of Michaelmas Term:

Ernest William Pearson, of Minnedosa;
John Obed Smith, of Winnipeg;
William Roderick Ross, of Winnipeg.

No bencher was on hand to present these gentlemen to the court! No one else has any legal right to make the presentation.

THE following gentlemen were admitted as attorneys on the same day:

John Obed Smith, of Winnipeg;
William Roderick Ross, of Winnipeg;
Norman Phelps Buckingham, of Boissevain;
John Alexander Mather, of Winnipeg.

ON November 25th last, Mr. Headley Clarence Taylor, of Edmonton, was enrolled an advocate of the North-West Territories.

FOR four days last week no arrest was made by the police in this city of 26,000 people, and on two days there was not even an adjourned case to come before the court so none was held! This is really worth noting.

HIS HONOUR Judge Ryan, of Portage la Prairie, has accomplished something that not many judges have done. He has actually held many Courts of Revision of voters' lists without even a grumble from fierce partizans, and each section of the press speaks in the highest terms of his extreme fairness and impartiality. We take this opportunity of saying that it is by a long course of such judicial bearing that the learned judge has won the confidence and respect of all classes in his judicial district.

WE HAVE received, anonymously, a marked copy of the Toronto *Saturday Globe* for Oct. 3 last. If the sender will furnish us with his name, we shall be obliged, for every communication to us is of course confidential, but we take no notice of anonymous matter of any kind.

ON November 19 last, Mr. W. Stewart, who is totally blind, was called to the Ontario bar, He wrote on his examinations with a typewriter, employing a boy to read the questions to him. He had previously obtained a scholarship.

MR. W. G. EAKINS, barrister-at-law, for the past eight years leading editorial writer on the *Mail*, has been appointed to the position of librarian to the Law Society of Upper Canada.

OUR readers will please note that this number ends our second volume and the index thereto will be issued shortly. Volume three commences in January.

THE LAW SOCIETY OF MANITOBA.

Convocation.

MICHAELMAS TERM.

WINNIPEG, MONDAY, NOVEMBER 30, 1891.

Present, Mr. Campbell, Q. C., president; Mr. Munson, treasurer; Mr. Aikins, Q. C., and Mr. Cameron.

The report of the examining committee dated 19th November, 1891, read and ordered to be adopted.

Ordered that Messrs. S. J. Rothwell, E. E. Sharpe and H. M. Wood, graduates, be admitted as students at law and articled clerks.

Ordered that Mr. J. O. Smith be called to the Bar and admitted as an attorney. Ordered that Mr. W. R. Ross be admitted as an attorney.

Report from the examiners dated 30th November, 1891, read and adopted, except with regard to J. A. Mather.

Ordered that Messrs. J. A. Bradley and A. G. Hay be allowed the first intermediate examination.

Ordered that Messrs. F. L. Davis and F. Mulvey be allowed the second intermediate examination.

Ordered that Messrs. E. W. Pearson and W. R. Ross be called to the Bar.

Ordered that Mr. G. Paterson be allowed his final examination for call.

Ordered that Mr. N. P. Buchingham be admitted as an attorney.

Ordered that Mr. Wade's recommendation with regard to Mr. J. A. Mather be adopted, and that he be admitted as an attorney.

TUESDAY, DECEMBER 1, 1891.

Present, Mr. I. Campbell Q. C., president; Mr. Munson, treasurer; Mr. Haggart, secretary; Messrs. Cameron, Perdue and Daly, Q. C.

The minutes of the meetings of 17th July and 30th November, 1891, were read and confirmed.

Communication from Messrs. Patterson & Wade, examiners, of 14th July, 1891, read and considered.

Ordered that the secretary write in reply thereto, that the benchers do not, in view of the present state of the finances of the Society, feel justified in increasing the remuneration of the examiners.

Letter read from Mr. R. G. Macdonald dated November 18th.

Ordered that he be at liberty to take his final examination for attorney as of Hilary Term next.

The following letters were read and ordered to be filed:

From Mr. J. N. Kirchhoffer dated 18th July, 1891.

From Mr. H. Acheson dated 25th July, 1891.

From Mr. Leeston Smith dated 24th July, 1891.

Letter read from A. W. Clark dated 28th November, 1891, enclosing fees for current year's certificate, and asking for remission of the fine, as he commenced to practice after the date when the fine became payable.

Ordered that a certificate be issued to him without the payment of the fine.

Letter read from the Department of Agriculture (Copyright branch) dated 13th July, 1891, enclosing certificates of registration of vols. 3, 4, 5 and 6, Manitoba Law Reports, registered by the Law Society of Manitoba.

Ordered to be filed.

Letter from the Department of Agriculture (Copyright branch) dated 20th October, 1891, stating that vol. 1 of the Manitoba Law Reports had been registered by Mr. R. D. Richardson, but that there was no trace of vol. 2 having been registered.

Ordered to be filed.

On motion to print the new curriculum

Ordered that the secretary write Mr. Goggin stating that the benchers would receive a delegation from the university authorities at their next meeting on Friday, December 11th.

Ordered that the portrait of Chief Justice Taylor painted by Mr. G. Berthon be approved of, and that a cheque for $500 be issued to Mr. Berthon on the special account.

Ordered that the secretary notify the parties whose names are mentioned in the schedule to by-law 19 that the by-law has been passed, and unless the arrears due are paid before the first day of Hilary Term next, a motion will be made in court to strike their names off the rolls.

Mr. Cameron gave notice that he would at the next meeting introduce a by-law to strike off the rolls all those members who were in arrear for two years or over.

Ordered that the three portraits of Chief Justices Wood, Wallbridge and Taylor be insured to their full insurable value in some company to be named to the satisfaction of the treasurer.

Ordered that Convocation meet on Friday, December 11th, at 4 o'clock.

FRIDAY, DECEMBER 11, 1891.

Present, Mr. I. Campbell, Q. C., President; Mr. Haggart, Secretary; Messrs. Cameron, Kennedy and Perdue.

The President took the chair.

The minutes of the last meeting were read and confirmed.

Letter read from the Attorney-General dated December 7th, 1891, stating that as requested by the Society, 100 extra copies of the Law Society Act had been ordered from the printer.

Ordered to be filed.

Ordered that 500 copies of the new curriculum be printed.

Mr. Cameron moved the first reading of the by-law to strike certain members off the rolls for non-payment of fees.

By-law read the first time and the second time.

Ordered to be read a third time on the second day of next Term.

Ordered that the parties mentioned in the by-law be notified that it stood for the third reading.

Ordered that the secretary write Mr. Ghent Davis calling his attention to the fact that his appointment was made on the terms that "the reporter will have to be present in Court and Chambers at all times during the argument of cases, to report practice and other cases of interest as well as such as have hitherto been reported," and it has been brought to the notice of the benchers that the contract has not been fulfilled on his part by attending in court.

THE WESTERN LAW TIMES REPORTS.

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

VOL. 2.

WINNIPEG, CANADA.

THE WESTERN LAW TIMES PUBLISHING COMPANY.

1891.

JUDGES

OF

THE COURT OF QUEEN'S BENCH

OF

MANITOBA.

DURING THE PERIOD OF THESE REPORTS:

THE HON. THOMAS WARDLAW TAYLOR, *Chief Justice.*

" " JOSEPH DUBUC,
" " ALBERT CLEMENTS KILLAM, } *Puisne Judges.*
" " JOHN FARQUHAR BAIN,

Attorneys-General:

THE HON. JOSEPH MARTIN,
(Resigned May 1, 1891.)
THE HON. CLIFFORD SIFTON.

Attorney-General of Canada and Minister of Justice:

THE HON. SIR JOHN S. D. THOMPSON, KNT.

TABLE OF CASES.

A

Allart, Wishart v., 35.
Alloway v. Campbell, 26,48.
Archibald v. Reginam, 117.
Ashbaugh, *Re*, 68, 81.
Ashdown v. *Free Press*, 142.

B

Balfour v. Drummond, 57.
Barrett v. City of Winnipeg, 119.
Barry, Regina v., 115.
Bergman, *Re*, 110, 155.
Bernardine v. North Dufferin, 141.
Bissett, Commercial Bank v. 49.
Bowman, Hatch v., 24.
Bradford, Stobart v., 40, 72, 75.
Brown, *Re*, 66.
Brydon v. Lutes, 79.

C

Calder, *Re*, 1.
Campbell, Alloway v., 26, 48.
Can. Pac. Ry. Co. v. Mun. of Cornwallis, 166.
Carley, Sparham v., 156.
Case Mach. Co. v. Laird, 83.
Chartier v. Roberts, 34.
Chisholm, Labatt v., 54.
Commercial Bank v. Bissett, 49.
Coombs, Thibaudeau v., 22.
Cornwallis, Munc. of, Can. Pac. R. Co. v., 166.

D

Davidson, Radford v., 93.
Davison, Rutherford v., 154.
Delorme, Patterson & Bro. Co. v., 146.
Dines, MacAra v., 99.
Drummond, Balfour v., 57.
Dube v. Reginam, 118.

E

Empire Brew. & Malt. Co., Ld., *Re*, 41.
Empire Brew. & Malt. Co. v. Winnipeg, 97.

F

Fairchild, Ferguson v., 63.
Ferguson v. Fairchild, 62.
Fisher, Regina v., 117.
Freehold L. & S. Co. v. McLean, 143.

Free Press, Ashdown v., 143.

G

Gendron v. Man. Mill. Co., 59.
Gibson, Peterson v., 71.
Gillies, O'Brien v., 76.
Gott, *Re*, 151.
Gott, Howell v., 151.
Grant, *Re*, 18.

H

Haddock v. Russell, 108.
Hanna, Massey Co. v., 87.
Hatch v. Bowman, 24.
Hay v. Nixon, 113.
Henderson, *Re*, 55, 74.
Higgins, *Re*, 95.
Higgins, Machray v., 105.
Hill, Hurtley v., 61.
Howatt, Whelan v., 25.
Howell v. Gott, 151.
Hud. Bay Co. v. Sayer, 12.
Hud. Bay Railway Co., West Cumberland Co. v., 20.
Hurtley v. Hill, 61.

J

Jones v. Williams, 22.

K

Keewatin Lumber Co. v. Wisch, 85.

L

Labatt v. Chisholm, 54.
Laird, Case Mach. Co. v., 83.
Lake Winnipeg Trans. etc. Co., Ld., *Re*, 106.
Leng, Young v., 148, 149, 155.
Lindsay, McCormick Harvesting Co. v., 36.
Lisgar Election Petition, *Re*, 45, 142.
Lutes, Brydon v., 79.
Lyons v. Man. Mill. Co., 89.
Lyons, Newman v., 145.

M

Malcolm, Regina v., 116.
Man. & N. W. L. Co. v. Storey, 36.
Man. Mill. & Brew. Co. Ld., *Re*, 101.
Man. Mill. Co., Gendron v., 59.
Man. Mill. Co., Lyons v., 89.
Martin v. Reginam, 66.
Massey Co. v. Hanna, 87.
Massey, Voght v., 16.
Matheson, Woods v., 20, 33.
Moir, Smart v., 37, 38, 77.
Morgan, Ross v. 112.
Morris, Lon. & Can. L. & I. Co. v., 142.
Morriset, Union Bank v., 31.
Murray, MacArthur v., 91.

Mc

MacArthur v. Murray, 91.
MacArthur, Stephens v., 141, 163.
MacAra v. Dines, 99.

McCartney, *Re*, 43.
Machray v. Higgins, 105.
McCormick Harv. Co. v. Lindsay, 36.
McCurdy, Regina v., 65.
McLean, Freehold L. & S. Co. v. 143.

N

Newman v. Lyons, 145.
Nixon, Hay v., 113.
North Dufferin, Bernardine v., 141.

O

O'Brien v. Gillies, 76.

P

Patterson & Bro. Co. v. Delorme, 146.
Pion v. Romieux, 58, 109.
Plante, Regina v., 50.

R

Radford v. Davidson, 93.
Regina v. Barry, 115.
" v. Fisher, 117.
" v. Malcolm, 116.
" v. McCurdy, 65.
" v. Plante, 50.
" v. Starkey, 146.
" v. Thomas, 159.
Reginam, Martin v., 66.
" Archibald v., 117.
" Dube v., 118.
Roberts, Chartier v., 34.
Romieux, Pion v., 58, 109.
Ross v. Van Etten, 102.
Russell, Haddock v., 108.
Rutherford v. Davison, 154.
Ryan v. Whelan, 142.

S

Sayer, Hud. Bay Co. v., 12.
Scott v. Thompson, 57.
Seguin, Thompson v., 32.
Shaw, *Re*, 52.
Smart v. Moir, 37, 38, 77.
Sparham v. Carley, 156.
Starkey, Regina v., 46.
Stephens v. McArthur, 141, 163.
Stobart v. Bradford, 40, 72, 75.
Storey, Man. & N. W. L. Co. v., 36.

T

Thibaudeau v. Coombs, 22.
Thomas, Regina v., 159.
Thompson v. Seguin, 32.
Thompson, Scott v., 57.

U

Union Bank v. Morriset, 31.

V

Voght v. Massey, 16.
Van Etten, Ross v., 102.

W

West Cum. Co. v. Hud. Bay Ry. Co., 20.
Whelan v. Howatt, 25.
Whelan, Ryan v., 142.
Williams, Jones v., 22.
Wisch, Keewatin Lum. Co. v., 85.
Wishart v. Allart, 35.
Winnipeg, City of, Empire Brew. Co. v., 97.
Winnipeg, City of, Barrett v., 119.
Woods v. Matheson, 20, 33.

Y

Young v. Leng, 148.

CASE INDEX.

A

ACTION—Proceeding for same in two districts at same time. 22

ADMINISTRATION—Of estate of intestate when claimants reside out of jurisdiction, and practice in such cases..... 153

ADMIRALTY—See Maritime Lien.

AGREEMENT—Not to sue, measure of damages for..... 76
See Contract.

AFFIDAVIT—See Practice.

AMENDMENT—By referee—
Discretion..... 38, 77
Of claim in winding up act.. 152
Of judgment entered..... 38, 77
Of mistake in law... 76, 156, 158
Of plea at trial..... 58
Of notice of motion..... 157

ANNUITY—See Will.

APPEAL—To full court, form of notice in case of..... 34
To Supreme Court, payment out of security after..... 57
From order of single judge made on petition under municipal act for taxes... 74
By executors of will from opinion of judge on application for advice of court..... 97
From finding of court, as to jurisdiction 99
From county court in replevin..... 108

ATTORNEY—Indictable offence —Striking off rolls—Master's report..... 68, 81
Admission of service by.... 148

ATTORNEY - GENERAL—Right to intervene on appeal from conviction..... 47

APPEARANCE—Entering so as to obtain preferential judgment..... 145

ASSESSMENT—See Municipal Law.

ASSINIBOIA—Courts of—See Hudson's Bay Co.

ATTACHMENT—See Practice.

B

BANKRUPTCY AND INSOLVENCY—See Fraudulent Preference.

BARRISTER—Disbarring for acts as attorney..... 68, 81

BILL OF COMPLAINT—See Practice—Pleading.

BILL OF SALE—See Fraudulent Preference.

BILLS AND NOTES—See Promissory Notes.

BRIT. N. A. ACT—See Constitutional Law.
Act of Prov. Legis. re gambling invalid..... 52

BY-LAW—Convicting for keeping gambling house *ultra vires* 52

C

CAUSE OF ACTION—Proceeding in two districts for same at one time 22
CERTIORARI—See Conviction.
CHATTEL MORTGAGE—See Fraudulent Preference.
COMMISSION—See Practice.
COMMITMENT—Contempt of Court, refusal to answer questions 102
CONTRACT—Non acceptance of work under—Right to recover when work not in accordance with contract.. 79
Non-acceptance of offer—Reasonable time for—Breach. 146
COMPANY—See Corporation.
COMPENSATION—See Expropriation.
CONSTITUTIONAL LAW—
Gambling house, Provincial Act re *ultra vires* 52
Fraudulent preferences, is Man. Act respecting *ultra vires?* 2, 163
Navigation, interference with by Provinces unlawful 117
Separate Schools, right of R. C.'s to in Manitoba.... 119
CONVICTION—Quashing—Jurisdiction of J. P..... 46
Quashing for keeping a gambling house..... 52
CORPORATION—Negligence—Liability of for not repairing streets..... 97
Wages, claim against directors of for 106
Winding up—See Winding Up Act.
COSTS—Action, same in two districts of County Court... 22
COSTS—*Contd.*
Counsel fee on evidence and with brief..... 31
Issues, when succeeding on various 109
On order for judgment when within juris. of Co. Court. 61
Prohibition, costs of, in general 87
Prohibition, costs of, when action withdrawn after... 87
Record, drawing and entering..... 109
Security for, under R. P. Act..... 24, 112
Security for, in interpleader by both parties..... 33
Security for, payment out of after decision of cause.... 57
Security for, staying proceedings when next friend not good for..... 155
Taxation of, after countermand and discontinuance. 31
Under Winding Up Act, of creditors' representative.. 149
COUNTERMAND — Effect of—See Costs.
COUNTY COURT—Appeal from in verdict in replevin.... .. 108
Discontinuance of action in—Effect of proceeding in two districts for same cause of action..... 22
Jurisdiction—Finding of judge as to 99
Prohibition, costs of where plaintiff withdraws action and costs in general..... 87
Prohibition, grounds for in general.. 87
Transcript of judgment—Effect of in Q. B.—Prohibition..... 54

CRIMINAL LAW—See Conviction and Extradition.

CROWN CASES RESERVED—Jurisdiction of Q. B. to hear, demurrer in..... 50

D

DAMAGES—Against Crown on public work..... 66
Against Crown on mail contract 117
Against Crown on Government railway 118
On breach of agreement not to sue..... 76
On breach of contract—Non-acceptance 146
Negligence for not repairing streets..... 97
To lands by railway siding.. 115
To lands by public work.... 116

DEBTOR—Examination of—See Discovery.

DECREE—Form of, and directions in as to receiver..... 75

DEMURRER—See Pleading.

DIRECTORS OF COMPANY—See Corporation.

DISCONTINUANCE—Of action, effect of as to costs in County Court..... 22

DISCOVERY—Certificate of Examiner necessary..... 20, 36
Examination of judgment debtor, material for..... 36
Foreigner, exam. of, when temporarily in jurisdiction 148
Refusal of debtor to answer—"Satisfactory questions".. 102
Particulars, better, order for. 33

DISCRETION OF JUDGE—See Jurisdiction.

E

ELECTION PETITION—Preliminary objections—Name, residence and occup. of petitioner—Copy of petition necessary 45, 142

EMBARRASSING PLEA—See Practice.

EQUITABLE PLEA—See Practice.

ERROR—See Amendment and Mistake.

ESTOPPEL—By final judgment. 38

EVIDENCE—Of identity of parties served with process..... 148
Parol, admissibility of on collateral agreements..... 83
See Discovery.

EXAMINATION—See Discovery.

EXECUTOR—See Will.

EXPROPRIATION—Of lands by Crown—Compensation—Assignment of rights.... 65, 115

EXECUTION—Writ of—Exemption of three months rent against..... 73
Against company under Winding Up Act..... ... 101

EXTRADITION—Forgery—Corroborative evidence—Judicial notice—Offence against U. S. laws 43

EXEMPTIONS — Allegations as to in bill on certif. of judgt. 85

F

FOREIGNER—Examination of —See Discovery.

FRAUDULENT PREFERENCE—Chattel mortgage—Effect of giving—Meaning of preference 163

FRAUDULENT PREFERENCE—*Contd.*
Right of subsequent creditors to attack—What amounts to 145
FRENCH JURY—Right to challenge for want of 50

G

GAMING and gambling house—See Conviction.
GOODS—Appeal from County Court on question of title to. 108
GOODS—Sale of, on receipt note 16
Stolen, property in 25
Property in, when acquired by misdemeanour 26

H

HALF-BREED—Right of, under Manitoba Act, effect of in sharing in Indian gratuity 159
HUDSON'S BAY CO.—Charter, consideration of—Courts of, extent of jurisdiction of 1
Exclusive right to trade in Rupert's Land 12

I

INDIAN—See Half-Breed.
INFANTS—See Will.
INJUNCTION—Motion for in chambers dismissed 40
Information for, *ex rel* Attorney-Gen. not a crim. proceeding in certain cases 117
INTERPLEADER—Security for costs in 32
Priority of execution creditors 145
INTEREST—Rate of, after due date of Mortgage 143
On lien note 16
INTESTACY—See Administration.
ISSUE—See Real Property Act.

J

JOINT STOCK COMPANY—See Company.
JUDGMENT—Procurement of preferential 143
JUDGMENT—Final—Effect of—Estoppel 38, 77
JUDGMENT—Transcript of judgment from County Court—Effect of when transcribed—Prohibition 54
JUDGMENT DEBTOR—See Discovery.
JUDICIAL NOTICE—Of proclamation, orders in council, etc. 43
JURISDICTION—Of County Court Judge and discretion of 90, 99
Of Referee to make order for trial by jury 60
Of Justice of the Peace in convictions 46
Of Queen's Bench in appeal in criminal cases 47
Of Queen's Bench in Crown cases reserved 50
Of Queen's Bench to hear appeal from order of single judge under Municipal Act 74
Of Queen's Bench in matters of mistake of Court 158
JURORS—French, right to 50
JURY—Challenge to array after issue joined 50
Order for—Power of Referee to make 60

L

LANDLORD AND TENANT—Distress for three months' rent, limitation of..... 74
LAND TITLES ACT—See Real Property Act.
LIEN NOTE—Right to retake under 16
Maritime—See Maritime Lien.
LIQUOR LICENSE—See Conviction.

M

MAINTENANCE AND EDUCATION—See Will.
MARITIME LIEN—In inland waters..... 110, 155
MECHANICS LIEN—In Winding Up Act..... 41
MANITOBA ACT—See Constitutional Law.
Titles under, to half-breeds.. 159
MILITARY Bounty Warrant—Patent to hold under..... 24
MISAPPREHENSION OF COURT—See Mistake.
MISTAKE IN LAW—Power of Court to act in cases of.. 38, 158
MORTGAGE—Interest on, rate of, after due date..... 143
Surplus taxes, right of mortgagee to..... 18
Tax sale, right to buy at.... 19
Trust estate, power to mortgage..... 105
MUNICIPAL LAW—Assessment, requirements of proper..... 26, 49
Assessment of taxes for educational purposes..... 119
By-law, re gambling, quashing..... 52
MUNICIPAL LAW—*Con'd.*
By-law, re assessment for school purposes, quashing. 119
Tax deed, proof required in support of..... 26, 49
Taxes, surplus, right of mortgagee to..... 18
Taxes, surplus, order for, who to be made by..... 55
Tax sale, proof of—Effect of validating acts..... 26, 49

N

NAVIGATION—Interference with by Crown and Local Legislatures..... 117
NEGLIGENCE—Damages for not repairing streets..... 97
NOTICE OF MOTION—See Practice.
NOTICE OF APPEAL—See Appeal.
NOTICE OF TRIAL—See Practice.
NOTICE—Judicial—See Judicial Notice.

O

ORDER—See Practice.

P

PARTNERSHIP—Liability of firm on note made by manager..... 63
PATENT—Cancellation of land. 159
PETITION OF RIGHT—For damages on contract with Crown 118
PLEADING—See under Practice.

POSTEA—Effect of succeeding on certain issues when postea on whole record..... 110

PRACTICE—Amendment, matters re—See Amendment.
Appeal, matters re—See Appeal.
Attorney, matters re—See Attorney.
Certiorari, matters re—See Certiorari.
Costs, matters re—See Costs.
County Court, matters re—See County Court.
Examination, matters re—See Discovery.
Execution, matters re—See Execution.
Injunction, matters re—See Injunction.
Interpleader, matters re—See Interpleader.
Winding Up Act, matters re—See Winding Up Act.
Admission of service, proof of..... 148
Affidavit, requirements of, for order to exam..... 36
Affidavit, requirements of, for order to proceed..... 92
Appearance, procuring in order to get judgment.... 145
Attachment—Setting same aside—Jurisdiction of referee..... 89
Commission—Suppression of Oath of Commissioner—Manner of taking depositions..... 59
Decree—Settling minutes of. 75
Demurrer—To challenge to array of jury..... 51
Demurrer—To plea on equitable grounds alleging agreement not to sue.... 76

PRACTICE—*Contd.*
Foreigner, exam. of when within jurisdiction..... 148
Identity of party served, proof of..... 148
Judgment, final, summons to sign for part of claim. 37, 39, 77
Judgment, final, summons for when amount in jurisdiction of County Court.. 61, 77
Judgment Debtor, exam. of—See Discovery.
Material, reading on notice of motion 20, 156
Next friend not a person of substance, staying proceedings..... 154
Notice of motion—Notice of reading material..... 20
Notice of motion—Short by leave of court..... 156
Notice of trial and neglect to enter record..... 109
Order, power of court to rescind..... 158
Particulars, where plaintiff is assignee, order for better. 33
Particulars, where writ specially endorsed..... 35
Payment of money out of court on appeal..... 57
Pleading—Certificate of Judgment—Allegations in bill as to exemptions..... 85
Embarrassing pleas—Striking out—Conditions precedent 20
Payment, effect of plea of. 58
Payment into court, joinder of issue on..... 58
Postea, effect of when various findings on issues.... 109
Record, costs of drawing and entering..... 109

PRACTICE—*Contd.*
Re-instatement of cause on appeal list..... 156
Security for Costs—See Costs.
Staying proceedings when next friend not person of substance..... 154
Writ *ex juris*, order allowing service..... 91
See Writ.
PREFERENTIAL JUDGMENT—Appearance so as to obtain.. 145
PROBATE—See Administration and Will.
PROHIBITION—See County Court.
PROMISSORY NOTE—Lien note—Right to retake under.... 16
Presentation of where no place named for payment. 40
Firm note made by manager, liability of partners on.... 63
PUBLIC SCHOOLS—See Schools 119

Q

QUASHING BY-LAW—See By-law.

R

RAILWAY—Damages to land by railway siding..... 115, 116
REASONABLE time to accept offer..... 146
RECEIVER—Appointment of, grounds for..... 72
Directions to in decree..... 75
RECORD—See Practice.
REFEREE—Discretion of to amend not reviewable..... 77
Jurisdiction of.....38, 77
RENT—See Landlord and Tenant.
REPLEVIN—Appeal from County Court in matters of.. 108
Proof of title in..... 16
REVIEWING DISCRETION OF JUDGE—See Jurisdiction.
ROMAN CATHOLICS—See Separate Schools.
RUPERT'S LAND—See Hudson's Bay Co.
REAL PROPERTY ACT—Adjournment of hearing of petition..... 71
Caveat, summons to lodge a second..... 93
Contracts of purchase, effect of..... 71
Issue—Form of—Plaintiff and defendant in... 22, 24, 113
Notice—Service of..... 113
Parties to petition, addition of.... 113
Patentee plaintiff in issue.... 24
Petition, leave to file new on terms..... 93
Petition adding parties to... 113
Plaintiff in issue..... 24, 113
Security for costs..... 24
Security for costs and waiver of..... 112
Tax surplus—Right of mortgagee to..... 18
Transfers, unregistered, effect of..... 72

S

SALE OF GOODS—See Goods.
SCHOOLS, Separate—Right of Rom. Caths. to—See Constitutional Law.
SECURITY FOR COSTS—See Costs.
SERVICE OF PROCESS—Evidence of identity of parties served..... 148

SHERIFF—See Execution.

SOLICITOR—See Attorney.

STATUTES—Construction of—
Retrospective..... 17
Ultra vires of Provincial .. 52
Pleading same..... 86

T

TAXATION—See Costs.

TAXES—See Municipal Law.

TREATY MONEY—Effect of receipt of..... 159

TRUSTEE—Removal of—
Grounds for..... 72

V

VARIATIONS—From building Contract—Effect of..... 79

W

WAGES—Liability of directors of company for..... 106
Maritime lien for..... 110

WILL—Application by executors for advice of court..... 95
Bequest of residuary estate to trustees—Effect of—Next of Kin..... 66, 95, 105
Infants, education and maintenance of 95, 105
Power of executors to mortgage estate, etc..... 95, 105

WILL—*Contd.*
Probate of incomplete will. 151
Witnesses to—No identification of..... 151

WINDING UP ACT—Amendment of claim filed under... 152
Creditor's representative—What costs allowed to.... 149
Leave to bring action—Claim for wages against directors..... 106, 155
Maritime lien—Claim of for wages 106, 155
Order for—Grounds of—Execution in Sheriff's hands—Disposal of property.... 101
Reservation of fund to satisfy maritime lien..... 110
Settling priorities—Preferential lien..... 41
Taxation of costs to creditor's representative..... . 149

WORDS AND PHRASES—"By leave of the Court"..... 156
"Effect of preference"..... 163
"Satisfactory questions" ... 102
"Or practice", in Manitoba Act 119
"Until the whole is fully paid and satisfied"..... 143

WRIT—Particulars under common counts where writ specially endorsed..... 37
See Practice.

THE

WESTERN LAW TIMES.

COURT OF GOVERNOR AND COUNCIL.

DISTRICT OF ASSINIBOIA,
RUPERT'S LAND.

IN THE CASE OF JAMES CALDER.*

At an ordinary meeting of the Court which was held on Thursday the seventeenth day of August in the year of Our Lord one thousand eight hundred and forty-eight. 1848.

Present: †

ALEXR. CHRISTIE, Esqre.
ADAM THOM, "
JOHN BUNN, "
ALEXR. ROSS, "

Mr. Recorder Thom commenced the proceedings by reading his opinion in the case to this effect :—

"James Calder has been brought into Red River Settlement to be tried before us for a felonious homicide alleged to have been committed by him in Peace River, which, after passing through Great Slave Lake, continues its

*Taken verbatim from vol. 1, pp. 100-114 incl., of the General Quarterly Court Records deposited in the Legislative Library at Winnipeg.

†Of these gentlemen, Mr. Christie was Governor of Assiniboia, Mr. Thom, Recorder of Rupert's Land, Mr. Bunn, Councillor of Assiniboia, and Mr. Ross, Sheriff of Assiniboia.

course to the Arctic Ocean under the name of McKenzie's River.

Have we jurisdiction in the matter? Individually, I answer in the affirmative, submitting at the same time, the grounds of my opinion to my brethren on the bench. But before I enter on the subject, I beg to express my satisfaction, that, on a point of such difficulty and importance, my habitual mode of discharging my duty has not left me at liberty to be influenced by the circumstances of the case under consideration. I need not remind you that I have uniformly embraced every opportunity of binding myself down in the absence of most of the extraneous guarantees of judicial impartiality, by the enunciation of every general principle that can be brought to bear on any particular issue. In pursuance of this rule of action, I have already twice anticipated the very opinion, which I am now about to justify and support. Six years ago I communicated it to my official superiors in an essay on the trade and judicature of what is commonly known as the Indian Territories; and in February 1845, I embodied the same in a detailed view of our jurisdiction, which I addressed along with various other matters, to the Grand Jury of this district.

To come to the merits of the case.

The Hudson's Bay Company's charter, on the 9th page of the printed copy, conveys "the sole trade and commerce of all those Seas, Streights, Bays, Rivers, Lakes, Creeks and Sounds, in whatever latitude they shall be, that lie within the entrance of the Streights commonly called Hudson's Streights, together with all the lands, etc." Coupled with the professed object of finding "a new passage into the South Sea," nothing can fairly be held to "lie within" the starting point of the royal grant, excepting what may be continuously connected with "Hudson's Streights" by means of the sea. Now, down to the discovery of the straits of

the Fury and Hecla, Hudson's Bay alone, in addition, of course, to Hudson's Straits, was known to "lie within" the starting point in question. As, previously to such discovery, the competition between the Hudson's Bay Company and the fur traders of Canada had come to a close, the only matter in dispute between the rival associations with respect to the extent of Charles the Second's Letters Patent, as distinguished from their validity, was not how much of the coast, but how much of the adjacent interior the charter comprised, so that the distinguished lawyers on either side were not required to consider the stretch of the charter to the westward.

But the discovery of the Straits of the Fury and Hecla, under the light of other discoveries, brought within the range of the charter the whole of the westward coast as far as the borders of Russian America, showing the same to "lie within" the entrance of Hudson's Straits. The Hudson's Bay Company, it is true, did not alone affect all those discoveries. This fact, however, does not stand in the way of the aforesaid interpretation of the Company's claims. The charter does not limit the Company in this respect to the enjoyment of its own discoveries; on the contrary moreover, the 18 Geo. 2, ch. 17,—a statute passed to encourage and reward the search for a North-West Passage—expressly saves the "estate, etc.," of the Hudson's Bay Company. In the analagous case, too, of the South Sea Company, the 9 Ann, ch. 21, s. 50, vested in that corporation all the islands that might be discovered within certain limits whether by its own ships or by those of the Crown.

Nor was the extent of the grant, which this interpretation claims, at all inconsistent with the spirit of the seventeenth century. Carolina, which, according to its charter, was private property as well as Rupert's Land, covered the whole width of the continent from the Atlantic to the

Pacific; and New France, as vested in a number of individuals by Louis the Thirteenth, was to extend in length from Florida to the Arctic Circle, and in breadth from Newfoundland to Lake Huron, and thence as much farther westward as the parties interested might carry the Gallic name.

But, in another respect also, the charter has had a growing accomplishment, and that, too, beyond the most liberal construction of its language. According to the terms alike of the application and of the grant, the Company's Territories, within the general limits aforesaid, were to be restricted to such places as were "not already actually possessed by or granted to any of Our subjects or possessed by the subjects of any other Christian Prince or State." Now there is reason to believe, that before, the fur traders of New France had reached some of the tributaries of Hudson's Bay. If such a fact could have been clearly established, then the entire extent of French possession would have been lost to the charter, even on its own showing. But the actual right would, in all probability, have been very different, for the treaty of Utrecht, without enquiring into the origin or duration of French possession, transferred to the company the French portion, whatever it might be, of the territories as generally described in the charter. The gradual extension to the westward therefore of the maritime border of the company's territories rests at once on the essential terms of the grant, and on the historical analogies of the inland boundary. Then, as the charter includes not merely "Seas and Streights," but "Rivers and Lakes"—thus, in fact, comprising everything back to the height of land—Peace River, as a matter of course, must follow the fortunes of the spot where its waters discharge themselves into the ocean, being just as much within the chartered territories as the mouth of MacKenzie's River, neither more certainly so, nor less certainly so.

Were I not anxious, at this distance from the busy world, to render these observations as complete as possible, I should hardly deem it necessary to anticipate an objection that may be founded on the use, whether chartered or popular, of the words "Hudson's Bay." If the South Sea Company held by one and the same term and from one and the same date, not only the American coast of the Pacific, but also a considerable part of the Atlantic coasts of Spanish America, then may the Hudson's Bay Co. consistently claim to hold something more than the shores of an inland sea from which it takes its name. Again, to cite the more formal title of the corporation last mentioned, surely the Adventurers of England "trading into Hudson's Bay" might without violating the proprieties of language, have sailed *through it* or *beyond it*, even if the document that incorporated them had not contemplated the finding of "a new Passage into the South Sea," and, in fact, the very document in question stated in its preamble, that Prince Rupert and his associates had "undertaken an expedition for Hudson's Bay in the North-West part of America for the discovery, etc." But even if not included in the primary and absolute grant aforesaid, Peace River may still be ours, under a secondary and contingent provision of the charter. That instrument on its twelfth page grants "unto the said Governor and Company, and their successors, that they shall forever hereafter have, use and enjoy not only the whole entire and only Trade and Traffick and the whole and entire and only Liberty, Use and Privilege of Trading and Trafficking to and from the Territory, Limits and Places aforesaid, but also the whole and entire Trade and Traffick to and from all Havens, Bays, Creeks, Rivers, Lakes and Seas into which they shall find entrance or passage by Water or Land out of the Territories, Limits and Places aforesaid." In this case where the Company's enjoyment was to depend on the Company's discovery, there

was contemplated something very different from the mere coast which might from time to time be ascertained to "lie within the entrance of the Hudson's Streights" in as much as these adjacent or subsidiary regions might be reached either by water or by land, or by both land and water. If a practicable "Passage into the South Sea" had been found, the secondary and contingent grant might have comprised the shores of the Pacific, provided such shores were visited through such passage, thus bringing the Hudson's Bay Company into lawful competition with the monopolies of the South Sea Company and the East India Company, just as these two monopolies potentially came into lawful competition with each other, the one by the Cape of Good Hope and the other by Cape Horn. Again, though a practicable channel was never discovered along the Arctic Ocean, yet the secondary and contingent grant might have embraced such of the shores of the Pacific as lay across the Rocky Mountains; something of the kind would appear to have been in the view of the framers of the charter, for in the sequel of the last quotation, the inhabitants of the primary and absolute grant are differently described from those of the secondary and contingent, the former being characterized as "Natives and People," and the latter as "Nations."

Now, Lieutenant Hearne, journeying "by land" on behalf of the Hudson's Bay Company, was the first to penetrate into that part of this country, which discharges its waters into the Arctic Ocean, as distinguished from Hudson's Bay, having preceded by about seven years, the earliest visit of the fur traders of Canada. Besides following the Coppermine River to its mouth, that officer, incomparably the most enterprising of all the northern discoverers, crossed Great Slave Lake, at once the receptacle of Peace River and the reservoir of Mackenzie's River, in 1771 or 1772, while it was only in 1778 that the

Company's Canadian opponents first surmounted the Portage La Loche; so that as the primary and absolute grant was to extend from the shores of the sea to the height of land, both Peace River and MacKenzie's River, as appendages of Great Slave Lake, then clearly fell by parity of construction within the range of the grant which was secondary and contingent.

To sum up the whole, Peace River under either grant, appears to me to be embraced within the limits of the Company's chartered right of exclusive trade.

Nor has the Company, to the best of my knowledge and belief, sacrificed any of its privilege in the premises by its acceptance of the royal licence, as sanctioned by the 1 and 2 Geo. 4, ch. 66. That statute authorized the issuing of a licence or of licences for trading with the Indians "in all such parts of North America as shall be "specified in any such grants or licences respectively, not "being part of the lands or territories heretofore granted "to the said Governor and Company of Adventurers of "England trading to Hudson's Bay and not being," etc. When taken in connection with the avowed aim of the statute to put an end to competition by converting a hitherto open commerce into a monopoly, the exemption of the "Territories" heretofore granted to the Hudson's Bay Company, would, under a fair and liberal construction, comprise as well the regions of the secondary and contingent grant as those of that which was primary and absolute. If so, any licence for Peace River—a stream embraced, as already shown, under either grant—would so far be null and void. In all probability, however, no tract of Wilderness has been particularly specified in the Company's licence, such specification not being necessary for any particular purpose in favor of the chartered holders of the exempted territories. In fact, the licence could not be expressed in any terms more advantageous to the Com-

pany than the very words of the statute, for in this way alone could it make sure of covering all that the charter had left, or might thereafter be found to leave uncovered.

To bring all this to bear on the question at issue, the chartered privilege of trading carried with it the rights of judicature. The statute, on its sixteenth page, ordained "that all Lands, Islands, Territories, Plantations, Forts and "Fortifications, Factories or Colonies, where the said "Company's Factories and Trade are or shall be within any "of the Parts or Places afore limited, shall be immediately "and from henceforth under the Power and Command of "the Said Governor and Company, their Successors and "Assigns: Saving the Faith and Allegiance due to be "performed to us, Our Heirs and Successors."

There would, however, be this difference. If Peace River, under the primary and absolute grant, should form part of Rupert's Land, then would the Company, as feudatory sovereign of the country, have jurisdiction over all and sundry the inhabitants of the same, subject, however, to the restrictions laid down with regard to the native tribes in the charge already mentioned to the grand jury; but if Peace River under the secondary and contingent grant should merely fall within the commercial monopoly, then would the Company, as not being in any sense sovereign of the country, have jurisdistion over those only who may live in its actual employment or under its actual protection. But in the present case, this distinction would be of no moment, in as much as James Calder, the prisoner, had gone to Peace River and was still remaining there as one of the Company's engaged servants.

Nor has the Company ever been deprived of its chartered jurisdiction, though the 43 Geo. 3, ch. 138, apparently intended to place the whole of the North-West under the criminal jurisdiction of the courts in Canada, yet a question was immediately raised whether or not its

provisions affected Rupert's Land; and the 1 and 2 Geo. 4, ch. 66, after recording in the most authentic forms the doubts on the subject and deciding the same in favor of the extraneous tribunals enacted, in a rider, "that nothing "in this act contained shall be taken or construed to effect "any Right, Privilege, Authority or Jurisdiction which the "Governor and Company of Adventurers trading to Hud-"son's Bay are by Law entitled to claim and exercise under "their Charter."

Under the operation of this rider, our jurisdiction remains in its original state; if it ever existed in Peace River it still does so.

But, even supposing our jurisdiction never to have existed in Peace River, and supposing also, as a matter of course, the jurisdiction of Canada to have been extended over the stream in question, I have still taken the responsibility, as resident counsel of the Hudson's Bay Company of declining to recommend that James Calder should be sent to Canada for trial. It is my opinion, as embodied long ago in the aforesaid essay and charge,* that the 3 and 4 Vic., ch. 35, commonly known as the Act of Union, has not saved to United Canada the jurisdiction vested in the separate provinces by the 43 Geo. 3, ch. 138, and the 1 and 2 Geo. 4, ch. 66.

These statutes, best observed, did not merely provide for the trial in Canada of such persons as were accused of having committed crimes in the North-West. They gave both to the judiciary and to the legislature of either province an authority, not the less certain for it being incidental, in and over the Indian Territories in general, and they moreover gave to the Governor of the Lower Province, the power of appointing magistrates, not only in and for the remoter Wilderness, but also in and for at least a part of the Upper Province itself. This jurisdiction, too complex and

Vide p. 2. We can find no trace of these valuable papers. They must be in the Hudson's Bay House, London.

peculiar to be saved by any general phraseology whatever, does not seem to me ever to have been contemplated by the framers of the saving or revising sections of the Act of Union.

But the jurisdiction of Canada, even if valid in point of law, is utterly repugnant to justice and humanity. Let us follow a prosecution through its various stages. To quote the very words of the law, as embodied in the two correlative statutes, "Any person or persons guilty," *guilty* being a slovenly substitute for *accused*, "of any crime or offence" may without the intervention of a single magistrate or the guarantee of a single affidavit, be dragged to Canada, from the farthest wilds of the North-West "by any person or persons whatever." During the journey the reputed offender, if he is really to be prevented from escaping, must be subjected to the most severe restraint, in as much as to say nothing of the temptations and facilities of the American settlement of Sault Ste Marie, the hardy denizen of the wilderness may elude his keepers in almost every encampment and on almost every portage. After a period of coercion ranging from six to eighteen months, according to the locality of the crime and the season of the year, the prisoner of "any person or persons whatever" is brought, probably for the first time, within the cognisance of law. If he is then discharged, the oppression of the system needs no comment of mine. But if he is formally committed for trial, he must pass several months in gaol before steps can be taken for the summoning of witnesses, and before he can be confronted with the witnesses for the prosecution, or have the benefit of those for the defense, he must, under the most favorable circumstances, lie two years longer in the prisons of what may to him be a foreign land.

But, the reputed offender's preliminary difficulties are not yet over. His trial may be delayed on various

grounds, and to give an instance of this, the very last case, and that is now twelve years old, was postponed from one half-yearly court to another, because neither bench nor bar possessed, or could procure a copy of the very statutes which conferred the jurisdiction. When he is put on his trial at last, the investigation of the truth is more likely than otherwise to suffer from the want of competent interpreters; and even the jurors themselves are almost inevitably deficient in knowledge of local customs and local character.

Meanwhile, the prisoner may be innocent, while the witnesses, who certainly are so, are enduring in the absence of their wives and families, a punishment perhaps heavier than the prisoner himself, even if guilty, may deserve.

Under these circumstances, is it too much to hope, that the jurisdiction over what are commonly known as the Indian Territories, if it is not ours already, may be vested in us by the Imperial Parliament, more particularly as the Governor of the District of Assiniboia is henceforward likely to bear a closer relation than before to the Crown.

I beg, therefore, to move, that James Calder, for whose trial in fact, the witnesses are not in this district, be detained in custody, and that a copy of this opinion and also of the evidence in the case be transmitted with the least possible delay to their Honors."

In this motion, the other members of the Court unanimously expressed their concurrence. †

---

† On p. 154 of the same volume, occurs the following entry, which explains itself. There are no signatures.

"William Cochrane and Robert Sutherland hereby promise and bind themselves in a Bond of Ten Pounds Sterling each for the safe keeping of James Calder, in open court this seventeenth day of May, One thousand eight hundred and forty-nine, District of Assiniboia,

Red River Settlement.

GENERAL QUARTERLY COURT.*

Held at the Court House, on the seventeenth of May, one thousand eight hundred and forty-nine.

Present:

MAJOR CALDWELL, Governor of Assiniboia, President.
ADAM THOM, Esqre., Recorder of Rupert's Land.
ALEXANDER ROSS, Esqre., Councillor of Assiniboia, J.P.
JOHN BUNN, Esqre., do. do. J.P.
CUTHBERT GRANT, Esqre., do. do. J.P.

17th May, 1849.

The Honble. Hudson's Bay Company
v.
Pierre Guilleaum Sayer

On the defendant being called to answer to the charge† against him a considerable time elapsed before he could be found, but on the assurance of Sheriff Ross that he was near at hand the Court waited, and the sheriff left the bench in search of him, but in place of the defendant coming to the bar of the court, James Sinclair, Peter Garrioch and many others presented themselves as Delegates from a great number of armed Half-Breeds who were outside the court. James

* This Court is the same as the Court of the Governor and Council mentioned on p. 1 in which the preceding judgment *re Calder* was pronounced. The name here given was the one by which it was almost invariably known, though the former is really the fuller and perhaps more correct title. In the records of the Court itself, however, the title in this case is the one employed with but very rare exceptions. This report is extracted verbatim from the General Quarterly Court Records, vol. 1, pp. 151, *et seq.*, in the Legislative Library at Winnipeg. We have made no attempt to alter any of the mistakes or inaccuracies of the clerk.

† That of trading furs in the H. B. Co.y's territories without a license from them to do so.

Sinclair handed a paper through the Clerk of the Court to the Governor. After the members of the Bench had read the paper, the Recorder asked Js. Sinclair in what capacity they appeared there. He answered, "As Delegates of the people." The Recorder replied that they could not be received in a Court of Justice in that capacity, and then explained to them from the Honble. H. B. Coy's charter, that as the charter then stood the company had the exclusive right of trade, and until that charter was set aside by Act of Parliament any person transgressing by trading was committing a breach of the laws. Sinclair here mentioned that many eminent characters in the Houses of Parliament in England entertained great doubts as to the validity of the H. B. Coy's charter, and in support of which assertion he handed to the bench a *Times* New's-Paper of the month of August last. After some further discussion it was offered to Sinclair to plead for the Defendant Sayer and leave given for him and his party to withdraw and consult on the same, and the offer made by the Recorder to Sinclair that he might sit as Foreman, and Garrioch on the Jury if he wished to do so; all that he wished was a fair and impartial trial. The party then withdrew. After some considerable time Sinclair appeared at the bar with Sayer and the Jurors who had sat on the former cases were still in the box, when Sinclair objected to five of them, and eleven others whose names were called; at last the Jury was as follows:

Mr. Donald Gunn.	Mr. John Vincent.
" William Thomas.	" Robert Sandison.
" James Tait.	" Prospère Ducharme.
" Narcisse Marion.	" Francois Bruneau.
" Philip Kennedy.	" Martin Lavallè.
" James Monkman.	" Dominique Ducharme.

Magnus Linklater, Post Master in the Honorable H. B. Coy's service, being duly sworn and interrogated, deponed:

—That the Defendant brought the Furs to the Company's shop, and I asked him if he had traded them, he replied that he had traded some and the others he had hunted himself. He said he had killed some foxes. I did not take the skins from him at that time.

Cross questioned by Sinclair—He did not say whether he had hunted the furs this year or three years or ten years past. All which was truth as the deponent should answer to God.

Louison Sayer, being duly sworn and interrogated, deponed:—That he was out with his father hunting and does not know that his father killed anything more than one red Fox, my Father got a present from his relations of a few skins, 2 Parchment skins, 3 Cat skins, and one Martin skin; he traded some furs from the half-breeds; Blankets was the principle article he traded with. I saw him give a dram of spirits to the people whom he was trading with; does not know if his father got any more furs in a present than those he mentioned before. All which was truth as the deponent should answer to God.

Antoine Morin, being duly sworn and interrogated, deponed:—That Chief Factor, I. E. Harriott, Esqre., of the H. B. Coy., asked me if I intended to go out to trade and if I did to come to him and he would give me advances for that purpose. All which was truth as the deponent should answer to God.

Alexè Goullet, being duly sworn and interrogated, deponed that he had bought a horse from Chief Factor Harriott and had told Mr. Harriott that he would pay him with furs he would trade, and he requested that I should not go near Doctor Todd's Fort. All which was truth as the deponent should answer to God.

The deponent here stated that when Mr. Harriott advanced him credit in the winter he forbid him to trade with Indians but said nothing about Half-Breeds. Chief

Factor John Ballenden, Esqre., of the Honble H. B. Coy. denied this as he himself had told him explicitly to be sure that he did not trade and if he could not pay his debt in furs, he would take salt from him for the balance that might be due in the spring, and that it was solely on his recommendation that Mr. Harriott advanced him, as the character of the Defendant previously had been very indifferent and Mr. Harriott did not wish to have anything to do with him.

The Recorder, after summing up the evidence, addressed the Jury and explained to them the Rights of the H. B. C. to the trade. The Jury withdrew and after some time returned into court with a verdict: That Pierre Guilleaum Sayer is guilty of Trading Furs.

The Foreman Mr. D. Gunn then addressed Chief Factor John Ballenden, Esqre., as the Prosecutor in this case recommending the Defendant to mercy as it appeared that he thought he had a right to trade as he and others were under the impression that there was a free trade. Mr. Ballenden immediately stated that the company did not value the Furs which had been traded, but it was the principle of the transaction which he looked at, but since a Jury has now given a verdict against the illicit trading he willingly acceded to the recommendation of the Jury and should drop the other three cases.

—That the Defendant brought the Furs to the Company's shop, and I asked him if he had traded them, he replied that he had traded some and the others he had hunted himself. He said he had killed some foxes. I did not take the skins from him at that time.

Cross questioned by Sinclair—He did not say whether he had hunted the furs this year or three years or ten years past. All which was truth as the deponent should answer to God.

Louison Sayer, being duly sworn and interrogated, deponed:—That he was out with his father hunting and does not know that his father killed anything more than one red Fox, my Father got a present from his relations of a few skins, 2 Parchment skins, 3 Cat skins, and one Martin skin; he traded some furs from the half-breeds; Blankets was the principle article he traded with. I saw him give a dram of spirits to the people whom he was trading with; does not know if his father got any more furs in a present than those he mentioned before. All which was truth as the deponent should answer to God.

Antoine Morin, being duly sworn and interrogated, deponed:—That Chief Factor, I. E. Harriott, Esqre., of the H. B. Coy., asked me if I intended to go out to trade and if I did to come to him and he would give me advances for that purpose. All which was truth as the deponent should answer to God.

Alexè Goullet, being duly sworn and interrogated, deponed that he had bought a horse from Chief Factor Harriott and had told Mr. Harriott that he would pay him with furs he would trade, and he requested that I should not go near Doctor Todd's Fort. All which was truth as the deponent should answer to God.

The deponent here stated that when Mr. Harriott advanced him credit in the winter he forbid him to trade with Indians but said nothing about Half-Breeds. Chief

Factor John Ballenden, Esqre., of the Honble H. B. Coy. denied this as he himself had told him explicitly to be sure that he did not trade and if he could not pay his debt in furs, he would take salt from him for the balance that might be due in the spring, and that it was solely on his recommendation that Mr. Harriott advanced him, as the character of the Defendant previously had been very indifferent and Mr. Harriott did not wish to have anything to do with him.

The Recorder, after summing up the evidence, addressed the Jury and explained to them the Rights of the H. B. C. to the trade. The Jury withdrew and after some time returned into court with a verdict: That Pierre Guilleaum Sayer is guilty of Trading Furs.

The Foreman Mr. D. Gunn then addressed Chief Factor John Ballenden, Esqre., as the Prosecutor in this case recommending the Defendant to mercy as it appeared that he thought he had a right to trade as he and others were under the impression that there was a free trade. Mr. Ballenden immediately stated that the company did not value the Furs which had been traded, but it was the principle of the transaction which he looked at, but since a Jury has now given a verdict against the illicit trading he willingly acceded to the recommendation of the Jury and should drop the other three cases.

—That the Defendant brought the Furs to the Company's shop, and I asked him if he had traded them, he replied that he had traded some and the others he had hunted himself. He said he had killed some foxes. I did not take the skins from him at that time.

Cross questioned by Sinclair—He did not say whether he had hunted the furs this year or three years or ten years past. All which was truth as the deponent should answer to God.

Louison Sayer, being duly sworn and interrogated, deponed:—That he was out with his father hunting and does not know that his father killed anything more than one red Fox, my Father got a present from his relations of a few skins, 2 Parchment skins, 3 Cat skins, and one Martin skin; he traded some furs from the half-breeds; Blankets was the principle article he traded with. I saw him give a dram of spirits to the people whom he was trading with; does not know if his father got any more furs in a present than those he mentioned before. All which was truth as the deponent should answer to God.

Antoine Morin, being duly sworn and interrogated, deponed:—That Chief Factor, I. E. Harriott, Esqre., of the H. B. Coy., asked me if I intended to go out to trade and if I did to come to him and he would give me advances for that purpose. All which was truth as the deponent should answer to God.

Alexè Goullet, being duly sworn and interrogated, deponed that he had bought a horse from Chief Factor Harriott and had told Mr. Harriott that he would pay him with furs he would trade, and he requested that I should not go near Doctor Todd's Fort. All which was truth as the deponent should answer to God.

The deponent here stated that when Mr. Harriott advanced him credit in the winter he forbid him to trade with Indians but said nothing about Half-Breeds. Chief

Factor John Ballenden, Esqre., of the Honble H. B. Coy. denied this as he himself had told him explicitly to be sure that he did not trade and if he could not pay his debt in furs, he would take salt from him for the balance that might be due in the spring, and that it was solely on his recommendation that Mr. Harriott advanced him, as the character of the Defendant previously had been very indifferent and Mr. Harriott did not wish to have anything to do with him.

The Recorder, after summing up the evidence, addressed the Jury and explained to them the Rights of the H. B. C. to the trade. The Jury withdrew and after some time returned into court with a verdict: That Pierre Guilleaum Sayer is guilty of Trading Furs.

The Foreman Mr. D. Gunn then addressed Chief Factor John Ballenden, Esqre., as the Prosecutor in this case recommending the Defendant to mercy as it appeared that he thought he had a right to trade as he and others were under the impression that there was a free trade. Mr. Ballenden immediately stated that the company did not value the Furs which had been traded, but it was the principle of the transaction which he looked at, but since a Jury has now given a verdict against the illicit trading he willingly acceded to the recommendation of the Jury and should drop the other three cases.

—That the Defendant brought the Furs to the Company's shop, and I asked him if he had traded them, he replied that he had traded some and the others he had hunted himself. He said he had killed some foxes. I did not take the skins from him at that time.

Cross questioned by Sinclair—He did not say whether he had hunted the furs this year or three years or ten years past. All which was truth as the deponent should answer to God.

Louison Sayer, being duly sworn and interrogated, deponed:—That he was out with his father hunting and does not know that his father killed anything more than one red Fox, my Father got a present from his relations of a few skins, 2 Parchment skins, 3 Cat skins, and one Martin skin; he traded some furs from the half-breeds; Blankets was the principle article he traded with. I saw him give a dram of spirits to the people whom he was trading with; does not know if his father got any more furs in a present than those he mentioned before. All which was truth as the deponent should answer to God.

Antoine Morin, being duly sworn and interrogated, deponed:—That Chief Factor, I. E. Harriott, Esqre., of the H. B. Coy., asked me if I intended to go out to trade and if I did to come to him and he would give me advances for that purpose. All which was truth as the deponent should answer to God.

Alexè Goullet, being duly sworn and interrogated, deponed that he had bought a horse from Chief Factor Harriott and had told Mr. Harriott that he would pay him with furs he would trade, and he requested that I should not go near Doctor Todd's Fort. All which was truth as the deponent should answer to God.

The deponent here stated that when Mr. Harriott advanced him credit in the winter he forbid him to trade with Indians but said nothing about Half-Breeds. Chief

Factor John Ballenden, Esqre., of the Honble H. B. Coy. denied this as he himself had told him explicitly to be sure that he did not trade and if he could not pay his debt in furs, he would take salt from him for the balance that might be due in the spring, and that it was solely on his recommendation that Mr. Harriott advanced him, as the character of the Defendant previously had been very indifferent and Mr. Harriott did not wish to have anything to do with him.

The Recorder, after summing up the evidence, addressed the Jury and explained to them the Rights of the H. B. C. to the trade. The Jury withdrew and after some time returned into court with a verdict: That Pierre Guilleaum Sayer is guilty of Trading Furs.

The Foreman Mr. D. Gunn then addressed Chief Factor John Ballenden, Esqre., as the Prosecutor in this case recommending the Defendant to mercy as it appeared that he thought he had a right to trade as he and others were under the impression that there was a free trade. Mr. Ballenden immediately stated that the company did not value the Furs which had been traded, but it was the principle of the transaction which he looked at, but since a Jury has now given a verdict against the illicit trading he willingly acceded to the recommendation of the Jury and should drop the other three cases.

—That the Defendant brought the Furs to the Company's shop, and I asked him if he had traded them, he replied that he had traded some and the others he had hunted himself. He said he had killed some foxes. I did not take the skins from him at that time.

Cross questioned by Sinclair—He did not say whether he had hunted the furs this year or three years or ten years past. All which was truth as the deponent should answer to God.

Louison Sayer, being duly sworn and interrogated, deponed:—That he was out with his father hunting and does not know that his father killed anything more than one red Fox, my Father got a present from his relations of a few skins, 2 Parchment skins, 3 Cat skins, and one Martin skin; he traded some furs from the half-breeds; Blankets was the principle article he traded with. I saw him give a dram of spirits to the people whom he was trading with; does not know if his father got any more furs in a present than those he mentioned before. All which was truth as the deponent should answer to God.

Antoine Morin, being duly sworn and interrogated, deponed:—That Chief Factor, I. E. Harriott, Esqre., of the H. B. Coy., asked me if I intended to go out to trade and if I did to come to him and he would give me advances for that purpose. All which was truth as the deponent should answer to God.

Alexè Goullet, being duly sworn and interrogated, deponed that he had bought a horse from Chief Factor Harriott and had told Mr. Harriott that he would pay him with furs he would trade, and he requested that I should not go near Doctor Todd's Fort. All which was truth as the deponent should answer to God.

The deponent here stated that when Mr. Harriott advanced him credit in the winter he forbid him to trade with Indians but said nothing about Half-Breeds. Chief

Factor John Ballenden, Esqre., of the Honble H. B. Coy. denied this as he himself had told him explicitly to be sure that he did not trade and if he could not pay his debt in furs, he would take salt from him for the balance that might be due in the spring, and that it was solely on his recommendation that Mr. Harriott advanced him, as the character of the Defendant previously had been very indifferent and Mr. Harriott did not wish to have anything to do with him.

The Recorder, after summing up the evidence, addressed the Jury and explained to them the Rights of the H. B. C. to the trade. The Jury withdrew and after some time returned into court with a verdict: That Pierre Guilleaum Sayer is guilty of Trading Furs.

The Foreman Mr. D. Gunn then addressed Chief Factor John Ballenden, Esqre., as the Prosecutor in this case recommending the Defendant to mercy as it appeared that he thought he had a right to trade as he and others were under the impression that there was a free trade. Mr. Ballenden immediately stated that the company did not value the Furs which had been traded, but it was the principle of the transaction which he looked at, but since a Jury has now given a verdict against the illicit trading he willingly acceded to the recommendation of the Jury and should drop the other three cases.

MANITOBA.

VOGHT v. MASSEY.

FEBRUARY 28, 1891.] [ARDAGH, Co. J.

Replevin—Lien Note—Interest—Right to retake.

Application by plaintiff for a new trial in a replevin suit on which judgment had been given for the defendant. The ground of the application was that sufficient evidence of title to put the defendants to the proof of a better one was given at the hearing. The defendant contended that the evidence did not show that the plaintiffs had bought from one who had owned the property before the same was taken under the lien note, nor was there any evidence that it was identical with the animal replevied. It appeared from the evidence that one Winkler sold a mare to one G. Wall, and to secure payment took a note for $200, dated Oct. 29, 1885, payable May 1, following. The note contained a clause that "one dark brown mare coming 6 years old, named Kate, belongs to E. Winkler until this note is fully paid, and the said E. Winkler shall have full power to declare this note due and take possession of said property at any time he may deem himself insecure." The note bears interest at the rate of 8 per cent. per annum "from date until due," and the maker also agreed to pay "15 cents for each and every day until paid." The maker of the note died, having paid $130 on the note shortly before it became due, and his widow had paid $79, leaving still due $15.00, and 2 years subsequent interest. Winkler then seized the mare, taking it out of the widow's possession, and sold it to his cousin for $75.00, who in turn

sold it for $225 to the plaintiff. The defendants were mortgagees of the widow before the seizure. The bailiff of the mortgagees, under instructions to seize, took it from the plaintiff.

O. H. Clark for plaintiff.

Patterson for defendant.

Held—

1. That in view of the circumstances any doubt as to the construction of 49 Vic., c. 32, should be given against the plaintiff.

2. "The opening language of the act makes it, I am inclined to think, retrospective. Instead of saying 'receipt notes, etc., given by bailees of chattels after the passing of this act' it enacts that 'from and after the coming into force of this act receipt notes, etc., shall only be valid in case of manufactured goods,' etc, There is no subsequent statement that previous transactions are not to be affected by the act, and although, as a rule, anything appearing to be in the nature of retrospective legislation is considered objectionable, and such a construction will always be avoided where possible, yet if the language used is sufficiently clear it seems to me that the meaning should be given to it, which the ordinary and proper manner of constructing a sentence usually calls for, that is to say, its grammatical construction."

3. That the language of the note is not sufficient to give Winkler a lien as owner or bailor of the property, and that the attempt as such is an evasion of the Chattel Mortgage Act.

4. That the note itself is so worded as to preclude the idea of interest after maturity and raises merely a question of damages.

Application dismissed with costs.

RE GRANT.

APRIL 20, 1891.] [BAIN J.

Real Property Act—Rights of Mortgagee to overplus of tax sale where he purchases.

This was an application by a mortgagee to have an order made directing the municipality to pay to him the surplus over and above the taxes after sale of the lands.

Perdue for petitioner.

Mathers for mortgagor.

The facts appear from the

Judgment—

It appears that one Wells mortgaged the parcels of land mentioned to the petitioner to secure the sum of $1,700 and interest, and that the time for payment of the mortgage has elapsed, and that there is still due on the mortgage the sum of $1,850, and interest.

On the 1st October, 1888, the mortgaged lands were sold by the city of Winnipeg for arrears of taxes, amounting to $104.03, and the petitioner purchased the lands at the tax sale for $156, and received a deed therefor from the city. Afterwards the petitioner made claim to be entitled to receive the balance of the purchase money that remained after paying taxes and costs, amounting to $51.67, and applied to the District Registrar, under secs. 158 and 159 of the Assessment Act, for an order for payment. It appearing upon the application that the equity of redemption in the mortgaged lands had, prior to the tax sale, been conveyed by Wells, the mortgagor, to one Mutton, and Mutton objecting to the payment of the surplus to Grant, the District Registrar, under the provisions of sec. 159, ordered the money to be paid into Court. The section directs that money thus paid in shall be dealt with by the

Court in the same manner as moneys of minors or infants in dispute in any cause or suit, or otherwise as the Court shall consider just and equitable.

Mutton, the owner of the equity of redemption in the lands, objects to the money being paid to the petitioner on the ground that the petitioner by taking a deed of the lands, has elected to take the lands in payment of the amount unpaid and due on the mortgage.

I think it is clear that the petitioner is entitled to this money. The counsel for the petitioner rested his claim to it on the equitable principles of conversion, but the application of these principles to a case where, as here, the mortgagee himself is the purchaser at the tax sale, and so has obtained all the mortgaged premises, is not as clear as where the land has been purchased by a third person. There the surplus is clearly impressed with the character of the realty, and stands *pro tanto* in place of the land. However, a mortgagee has the right to buy at a tax sale, and the effect of a sale to him is the same as if he had obtained a final order of foreclosure. *Miller* v. *McCuaig*, 6 M. R. 539. On obtaining a final order for foreclosure, the mortgagee is entitled to the whole of the security, and if the petitioner does not get this money back, he will just be losing so much of his security. In another view, this money that he had to pay to save himself from losing his security on account of the default of the mortgagor or his assigns in not paying the taxes, and the surplus that remains still belongs to him.

Order for payment to petitioner.

PRACTICE.

WEST CUMBERLAND CO. v. HUDSON BAY R'Y CO.

MARCH 26, 1891.] [BAIN, J.

Notice of reading examiner's certificate with examination on motion.

A motion was made before the Referee for a defendant Company's president to attend before a special examiner, at his own expense, and answer certain questions which he had already refused to answer before such examiner.

The notice stated "that upon and in support of such motion will be read the examination of the said ———— taken before the said ——— (a special examiner) " in this suit and this day filed and also the pleadings and proceedings herein."

The Referee dismissed the motion upon various grounds. An appeal was entered.

Ewart, Q. C., and *Bradshaw* for the motion.

Howell, Q. C., and *Phippen* for the company objected that in any event the certificate of the examiner attached to the examination above referred to could not be read in support of the motion, as the notice did not provide for its being read.

Held—

That the objection was fatal.

Motion dismissed with costs.

WOODS v. MATHESON.

APRIL 5, 1891.] [TAYLOR, C. J.

Pleading—Conditions precedent—Embarrassing plea.

This was an appeal by the defendant from an order of the Referee.

Kennedy, Q. C., for plaintiff.

Howell, Q. C., and *Mathers* for defendant.

Judgment—

The defendant appeals from an order of the Referee striking out his second plea as embarrassing. The first count in the declaration, the one to which it is pleaded, alleges an agreement under which the plaintiff paid a large sum of money, and thereby became entitled to the transfer of certain stock, and in default of that to repayment of the money. It then alleges, in the usual terms, that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to payment of the money, and the neglect and refusal of the defendant. The plea alleges that the agreement was in writing, it sets it out, *in extenso*, and then says that "save by the payment of the said sum of $5,142 the plaintiff has not complied with the requirements of the first, second, fourth or seventh paragraphs of the said last mentioned letter, or any or either thereof, nor except by the said payment has the plaintiff done any of the acts required by either of the said paragraphs.

That seems a perfectly good plea. All the matters set out go to make up one defence, that the plaintiff has not performed the whole of his part of the agreement. Had the plea set out the agreement as it does, and then alleged in general terms non-performance by the plaintiff, that would have been good. Can it be made bad by stating specifically that part of it he has not performed?

The question is whether the requirements of the different paragraphs mentioned are conditions precedent or not, and the plea seems properly framed for obtaining at once, by a demurrer, the judgment of the Court as to that. The course taken by the defendant in thus pleading the agreement is the one approved of by the Court in *Kempster* v. *Bank of Montreal*, 32 U. C. R. 87.

In my opinion the order of the Referee should be set aside with costs, and the summons to strike out the plea dismissed with costs. The costs, both of this appeal and on the summons, to be costs in the cause to the defendant in any event.

THIBAUDEAU v. COOMBS.

APRIL 13, 1891.] [BAIN, J.

Real Property Act—Form of issue.

The caveators were judgment creditors endeavoring to preserve their lien under a certificate of judgment which was registered prior to the issue of the tax deed, but subsequent to the sale. For other facts, see *ante*, p. 251. Discussion arose as to the question to be tried, and as to who should be plaintiff.

Huggard for caveators.

O. H. Clark for caveatee.

Held—

That the caveators should be plaintiffs and that the form of the issue should be as to whether the plaintiffs were entitled to a lien or charge upon the lands in question at the time of the application for the certificate of title.

Issue so directed.

JONES v. WILLIAMS.

APRIL 13, 1891.] [ARDAGH, Co. J.

County Court—Proceeding in two districts for same cause of action—Discontinuance—Effect of—Costs.

Plaintiff sued defendant in Western Judicial District and, while suit was still pending there, brought action in this district for the same claim.

Defendant filed dispute note in first suit and paid into Court a sum as in full of plaintiff's claim, and the latter

thereupon entered suit here and, after service of the writ, gave notice of discontinuance to the clerk of the court in the prior action.

Wade for plaintiff.

Colin H. Campbell for defendant.

Held—

1. That the plaintiff was entitled to take this step, having a choice of jurisdictions; and that the notice of discontinuance, having the same effect as taking a nonsuit, freed the money in court and the defendant was forthwith entitled to a refund of same without any deduction. Sec. 80, C. C. Act, does not conflict with this view.

2. The proper course for the defendant to take after he had been served, and before notice of discontinuance, would have been to apply for a stay of proceedings until the plaintiff had elected as to which suit he would proceed with and had paid the defendant's costs in the discontinued one, instead of entering a dispute note and going to trial on the sole issue that the plaintiff had no right to sue him in both courts at once.

3. "There is no doubt that the defendant could not get the money, paid into court, refunded until notice of discontinuance had been given, and it might be presumed that he was thus hindered from paying it into court in this suit, but I think that in alleging the payment he sufficiently protected himself in the matter of costs in case he succeeded in proving his contention that he was not indebted to the plaintiff beyond that amount. The plea of tender simply involved a question of costs over which the court before which the trial is had has full control."

4. The plaintiff's proceedings being "certainly oppressive," and the defendant having been put to the expense of employing an attorney at Deloraine, for which the Act does not entitle him to compensation, in addition to em-

ploying counsel here, no costs of suit would be allowed the plaintiff even though he succeeded in the action.

Verdict for plaintiff without costs.

HATCH v. BOWMAN.

APRIL 16, 1891.] [BAIN, J.

Real Property Act—Military Bounty Warrant—Patentee plaintiff in issue—Security for costs.

Issue under Real Property Act. Questions arose as to who should be plaintiff in issue, and as to security for costs.

Munson for plaintiff.

Pitblado for defendant.

The facts appear from the

Judgment—

It appears *prima facie* from the material before me that the lands in question were located by Hatch, under a Military Bounty Warrant, on the 5th of June, 1878, and that on the 8th of June following, he conveyed all his estate and interest in the lands to one Beach. Beach afterwards conveyed to Wallace, whose executor, Bowman, the caveatee, applies for a certificate of title. It appears also from the affidavit of Mr. Cooper that Wallace was in possession of the lands when he died, and had been in possession previously thereto. Hatch claims in his petition as patentee from the Crown, under a grant bearing date the 17th of March, 1887.

Under these circumstances, I think that Hatch, the caveator, although he has the Crown patent, must be the plaintiff in the issue, and, as he resides out of the jurisdiction, he must give security for the caveatee's costs. The security to be given within two months, and the issue to be delivered by the caveator within three days after notice of the completion of the security.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

WHELAN v. HOWATT.

APRIL 25, 1891.] [ARDAGH, Co. J.

Trover—Property in stolen goods—Third party.

Motion for reversal of verdict entered for defendant, without costs, in County Court of Selkirk.

Trover for a team of oxen and set of harness, valued at $135.

Plaintiff was driving an ox team when he met one Gardner driving a pair of horses in a bob-sleigh. The latter suggested a trade, and plaintiff exchanged his oxen and harness and a silver watch, for the horses and harness. Plaintiff was overtaken by a detective who seized the horses as stolen property. In the meantime Gardner sold the oxen to the defendant for $50.00. Gardner was subsequently convicted of larceny on the prosecution of the owner who obtained the usual order for restitution. Plaintiff described Gardner as being boyish looking, and apparently about 19. Plaintiff demanded the oxen and harness from defendant who refused to give up same without payment of the sum he had given for them.

Cassidy for plaintiff, cited *Marsh* v. *Keating*, 1 Bing., N. C. 198.

Patterson for defendant, cited *Altenborough* v. *Lond. and St. Kath. Dock Co.*, 3 C. P. D. 450, and *Bentley* v. *Vilmont*, 12 App. Ca. 471.

Held—

The plaintiff could not succeed.

"A distinction is made between cases of felony and misdemeanour. The purchaser of stolen property acquires no title whatever against the owner, it may be otherwise where possession is obtained in the first instance by fraud, but with the consent of the owner. It is contended that Gardner had in fact obtained the property feloniously. The distinction, however, between a trade or barter which took place in this instance and a contract of sale does not appear to me to be maintainable. The plaintiff by his own act divested himself of the possession of the property and so gave the other party an opportunity to dispose of it to an innocent purchaser. It appears to me that the defendant obtained a good title to the property, although a conviction of Gardner on the prosecution of the plaintiff would appear to have entitled the latter to an order for restitution, or might have revested the title to the property in him. I am of opinion that the conviction of Gardner upon another charge, through another prosecutor, did not affect the defendant's title or give the plaintiff any other rights than such as he had otherwise possessed."

Motion refused with costs.

ALLOWAY v. CAMPBELL.

MAY 11, 1891.] [BAIN, J.

Tax sale—Effect of tax deed—Assessment of taxes—Validating Acts.

Issue under Real Property Act. Plaintiff claims to be owner in fee simple of lands in the city of Winnipeg, bought

by him at tax sale, and for which a tax sale deed duly issued to him from the city of Winnipeg. Relying on the provisions of sec. 673 of the Municipal Act of 1886, as amended by 50 Vic., c. 10, s. 52, the plaintiff proved the due execution of the deed and gave evidence in which he showed that the lands had been sold to him at the tax sale held by the city in October, 1888; that taxes on the lands, amounting to $92.95, for the years 1886 to 1887 were then in arrear and unpaid, and that the sale had been conducted in a fair, open, and proper manner.

Howell, Q.C., and *Cumberland* for plaintiff.

Ewart, Q.C., and *C. P. Wilson* for defendants.

Judgment—

In *Ryan* v. *Whelan*, 6 M. R., 565, and *Archibald* v. *Youville*, not yet reported,‡ this court has held that a person relying on a tax sale deed, must, notwithstanding the validating provisions of the Municipal Act, prove that at the time of the sale taxes were in arrear and unpaid, for which the land might legally be sold. To prove that taxes were thus in arrear, the plaintiff called the city treasurer and the city collector, who proved and put in the collector's rolls for the years 1886 and 1887, shewing these taxes in arrear, and the list of lands in the city liable to be sold for taxes made up by the collector in Sept., 1888, under sec. 672 of the Act of 1886, for submission to the mayor and authenticated by him, and the mayor's warrant to the treasurer commanding him to levy upon the lands in the list for the arrears of taxes shewn thereon. No witnesses were called for the defendant and there is nothing before me to shew that all the provisions of the Municipal Act in regard to assessing the land and imposing the rates have not been complied with. The defendants, relying on the case of *O'Brien* v. *Cogswell*, 17 Sup. Ct., 420, contend that

‡ The reports of this case, both before a single judge and on appeal, will be found in Vol. 1, pp. 140-2, and 237-9, November and March issues.

the evidence the plaintiff has given is not sufficient, and that he should also have proved the assessment of the land and notice to the party or parties interested. If, however, such evidence as the plaintiff has given is not sufficient to prove arrears, then I should think it would be necessary to prove, not only the assessment and notice, but that all the imperative directions of the statute, both as to assessing the land and levying the rates, had been complied with, that is that the taxes alleged to be in arrears when the land was sold, had been legally and lawfully imposed. This question of what proof of taxes in arrear shall be deemed to be *prima facie* evidence sufficient, is one of considerable practical importance, and, as far as I know, has not been directly raised before in this court. The plaintiff cites a number of Ontario cases, which shew that the rule is established there that, in order *prima facie* to prove taxes in arrear, it is not necessary to go behind the treasurer's books or the collector's rolls and prove the assessment of the rates. [After a consideration of the cases of *Doe* v. *Reaumore*, 3 O. S., 245; *Errington* v. *Dumble*, 8 U. C. C. P., 65; *Hill* v. *Hill*, 22, U. C. Q. B., 579; *Clarke* v. *Buchanan*, 25, Gr. 559; *Fitzgerald* v. *Wilson*, 8 Ont., 559; and *McKay* v. *Chrysler*, 3 S. C. R., 449, the learned judge resumes] Under our Municipal Act, each municipality, instead of returning arrears of taxes to the county treasurer for collection, collects its own arrears by selling the lands. The list of lands and arrears thereon that the Act directs the treasurer or collector to make up and to submit to the mayor or reeve, is made up under direct statutory authority and directly from the tax rolls, and must, I think, be considered to have as much weight as evidence as could be given to the entries in the treasurer's books, or to his warrant. But in the one case as much as in the other, I find myself at a loss to see how such document can be considered sufficient to prove that the taxes shewn in them were lawfully im-

posed, that is that the directions of the statute as to assessment and imposing the rates had all been properly taken. It may be open to question if the maxim *omnia praesumuntur*, etc., is to be given application at all in such a matter, and, if it is to be applied, the only presumption I could draw would be, that the treasurer or collector, in making out the list, or the warrant, or in making the entries in the books, had properly discharged the duty cast upon him and that the list, or warrant, or books, were correct according to the materials or returns from which they were made up. But I know of no rule that would justify me, in the absence of statutory direction, in holding that, because on this list, or in the collector's rolls, taxes in certain lands are stated to be in arrear, it is to be presumed that all the directions of the Assessment Act as to assessment, etc., that must be followed before the taxes are a legal charge against the lands, were in fact followed and complied with. It might be convenient to draw a line at some point, as the Ontario courts did, and not require a person seeking to prove taxes in arrears to go back in the first instance behind this line, but, whatever a court might do, I do not feel that I have authority to fix any starting point for the evidence, short of the first step prescribed by the statute. Before a sale for taxes can be held to be valid, it must be proved that at the time of sale taxes were in arrear for which the land was liable to be sold; and there could not have been such taxes unless they had been legally imposed. [After quoting from *O'Brien* v. *Cogswell*, 17 S. C. R., p. 425, and *McKay* v. *Chrysler*, 3 S. C. R., 449] It is true that in *O'Brien* v. *Cogswell* the fact that the notice of assessment had not been served was put in issue and proved; but the whole case, and the remarks of the judges, appear to me to be altogether irreconcilable with the view that, from the evidence offered in the present case, I should presume that the taxes appearing against the land had been legally imposed.

Sec. 673 makes the deed "conclusive evidence of the validity of the sale and of all proceedings prior to the same." But this refers only to the proceedings preliminary to the sale after the issue of the warrant to sell, and will not supply or cure omissions or defects in the assessment, and alter proceedings prior to the issue of the warrant. A person relying on a tax sale deed must prove, before he can be held to be entitled to the land, that, at the time of sale, there were in fact taxes in arrear for the land for which it could legally be sold. Unless certain imperative directions of the statute were followed and complied with, the taxes alleged to have been in arrear here would not have been legally imposed, and the land would not have been legally liable to be sold. The plaintiff has failed to show that the taxes were legally imposed, and he has not, therefore, established that he is the owner in fee simple of the land.

Instead, however, of entering a verdict for the defendants in the issue directed, I think the case is one in which I should enter a non-suit.

[The plaintiff appealed. The case was argued before the Full Court on the 14th instant, and stands for judgment.—Ed.]

PRACTICE.

UNION BANK v. MORRISET.

APRIL 23, 1891.] [IN CHAMBERS—BAIN, J.

Taxation of costs where countermand is given and discontinuance entered—Counsel fees on evidence, and with brief.

Appeal by plaintiff from Master's taxation.

C. P. Wilson for plaintiff.

Joseph Curran for defendant.

The facts appear from the

Judgment—

The plaintiffs gave notice of trial for a Tuesday court and then gave the usual notice of countermand, and afterwards discontinued the action. On the taxation of the defendants costs of the action the Master allowed a fee for counsel advising on the evidence, and a counsel fee with brief.

The English practice appears to be that where notice of trial has been properly countermanded, neither counsel or witness fees are allowed. In a case in 12 Mod. 960, it was held that "if upon notice of trial, defendant draws breviats, retains counsel, and makes ready his witnesses before that notice is countermanded, he shall have such costs as the Master shall tax." But in the subsequent case of *Whitlock* v. *Humphreys*, 2 Str. 849, upon debate it was settled that, to save costs for not going on to trial, it would be sufficient to countermand notice in a town case two days, in a country case four days before the assizes; and that it should be a general rule without considering the charges or inconveniences in any particular case. In *Marshall on Costs*, p. 117, it is said that the English practice has been settled in accordance with this case. If this be the rule, it will be

applicable on taxation of the costs of the action, under circumstances like the present, as well as on taxation of the costs of the day. The Master should not, I think, have allowed the counsel fee.

Rule 4 of the Gen. Rules of Practice, H. T. 1853, provides that the Masters shall have discretion in all cases to allow, as between party and party, the fees of counsel or special pleaders for drawing pleadings or other proceedings, whether special or otherwise, and advising.

It may, on the whole, be best, and reasonable, that a party should not be allowed to tax costs he chooses to incur in retaining counsel, and otherwise preparing for trial before the time for countermanding a notice of trial has expired.

But it would seem altogether unreasonable to hold that a defendant must defer obtaining the opinion of counsel on his evidence until within four days from the trial; and I think that as soon as issue is joined, either party should be entitled to tax a fee for such an opinion, if the Master, in his discretion, thinks the opinion of counsel was reasonably taken. Under our practice, either party may give notice of trial before a judge, as soon as issue has been joined, and a defendant as well as a plaintiff may wish to have the opinion or advice of counsel on his evidence, with a view to deciding whether or not to give notice of trial. The Master, I think, had discretion to allow this item.

Fee on evidence allowed; fee with brief disallowed.

THOMPSON v. SEGUIN.

APRIL 27, 1891.] [THE REFEREE.

Security for costs—Interpleader issue.

Upon the return of an interpleader summons when the issue was being settled, the execution creditors, defendants in the issue, moved that the claimants, plaintiffs, should give

security for costs. Both the execution creditors and the claimants resided out of the jurisdiction.

Elliott for claimants.
Huggard for execution creditors.
Cumberland for sheriff.

Held—

That the execution creditors, defendants in the issue, should give security to the claimants, the plaintiffs therein; and that the claimants should likewise give security to the execution creditors.

WOODS v. MATHESON.

MAY 4, 1891.] [THE REFEREE.

Practice—Further particulars where plaintiff is assignee.

Summons for further particulars.

Kennedy, Q. C., for plaintiff, shewed cause.
Mathers, for defendant, for the motion.

The facts are fully stated in the

Judgment—

Plaintiff sues as assignee of A. Woods who agreed with defendant to advance moneys to pay debts of the Lake Winnipeg Trans. Co. The particulars furnished show three certain items, and the examination of plaintiff supplementing these, shows that these sums were paid in to the credit of the company at the Union Bank. The particulars furnished might have shown where the money was deposited, but that has been shown by the examination and the summons is not for that purpose. The question argued is—whether the plaintiff should furnish particulars of the sums paid out of the Union Bank, so that they may know what debts of the company were paid by A. Woods —defendant alleging that he believed the money was largely paid out on account of debts of A. Woods and not of the company.

Mr. Kennedy argues that the plaintiff, being the assignee of A. Woods, has no knowledge of what A. Woods did with the money after it was deposited in the bank.

Mr. Mathers argues that an assignee should be in no better position than the assignor—that if A. Woods were plaintiff he would be compelled to furnish the information asked for and so therefore should the plaintiff, citing *Jones* v. *Lee*, 25 L. J. Ex. 241.

The information asked for is clearly such as would benefit the defendant in preparing for the trial, and he would be entitled to the order if A. Woods was the plaintiff here. The information is in the possession of the plaintiff's assignee, and the plaintiff does not show that he has tried to obtain it and failed; in fact his examination shows that he has access to the papers and books in which the information is contained. He contents himself with the position that the particulars are not within his knowledge. I can find no authority for the position that the plaintiff is excused for giving particulars because they are not within his knowledge. He must prove at the trial that the moneys were paid for the benefit of the company, to do this he must prove to whom the different sums were paid, and I think he must now furnish the defendant with the particulars of such payments.

Order to go; costs to the defendant in the cause.

CHARTIER v. ROBERTS.

MAY 6, 1891.] [FULL COURT—DUBUC, J. KILLAM, J. BAIN, J.

Practice—Form of notice of appeal.

A notice of appeal to the Full Court, given by the defendant, read as follows:

[FORMAL PARTS.]

"Take notice that the defendant has filed his præcipe therefor, and that this cause has this day been entered

with the prothonotary on the list of causes for rehearing by the court *in banc* by way of appeal from the judgment or decision of His Lordship, the Chief Justice, pronounced herein on the twenty-fourth day of February, A. D. 1991, upon the *application* of the defendant to have the said judgment or decision set aside or varied and another and different verdict in favor of the defendant entered herein or a new trial had on the following grounds:"

Then followed the usual grounds, as in Chitty's Forms.

Dawson and *Nason*, for plaintiff, moved to quash the appeal on the ground that the notice given was not sufficient in that the notice referred apparently to an appeal from a judgment upon some application made to the Chief Justice for a reversal, etc., of the verdict and not by way of appeal direct from the verdict.

Huggard, for defendant, appellant, in reply.

Held—

That the notice sufficiently informed the plaintiff of the entry of the appeal, etc., and was sufficient.

Per Killam, J. The proper term is "motion," not "application."

Hearing proceeded with.

WISHART v. ALLART.

MAY 14, 1891.] [THE REFEREE.

Practice—Further particulars—Writ specially endorsed.

Summons for better and further particulars. Writ specially endorsed. Declaration contained only the common counts.

Elliot, for plaintiff, shewed cause and cited *Martel* v. *Dubord*, 3 M. R. 598, and C. L. P. A., 1852, sec. 25.

Davis, for defendant, for the motion.

Held—

The writ being specially endorsed, and the declaration being on common counts, no further particulars were necessary or allowable.

Summons dismissed, costs to plaintiff in any event.

MAN. & N. W. L. CO. v. STOREY.

MAY 18, 1891.] [THE REFEREE.

Examination as judgment debtor—Sufficiency of affidavit.

Patterson moved absolute a summons to examine as judgment debtor.

Archer Martin showed cause and objected that the affidavit on which the summons was based was made by an articled clerk, and not by the attorney, or the plaintiff. An articled clerk could not properly swear to the 3rd clause as follows: "Said judgment is wholly unsatisfied." The practice hitherto had not been to consider such an affidavit sufficient. In any event the deponent showed no special means of knowledge.

Held—

The affidavit was sufficient and not objectionable on such grounds.

Order to go for examination.

McCORMICK HARVESTING CO. v. LINDSAY.

MAY 18, 1891.] [THE REFEREE.

Examiner's certificate—Depositions cannot be read without.

Mulock, Q.C., moved absolute a summons to strike out defence on ground that defendant refused to answer questions properly put to him on his examination on his pleadings. The summons was taken out "upon reading the pleadings, the particulars of the cause of action, the order and the depositions of the defendant and the affidavit of W. R. M., this day filed."

Davis, for defendant, objected that the certificate of the examiner, proving the depositions, was not included in the material set out in the summons, and that therefore the depositions could not be read.

Held—

The objection was fatal, following *West Cumberland Co.* v. *Hudson Bay Ry. Co.*, p. 20, *ante.*

Summons dismissed, costs to defendant in any event.

SMART v. MOIR

MAY, 1891.] [IN CHAMBERS—KILLAM, J.

Q. B. Act, sec. 36—Summons to sign final judgment for part of claim.

Summons to sign final judgment for part of claim under Queen's Bench Act, sec. 36.

Declaration in debt for wages and on the common counts.

Pleas, 1. Never indebted. 2. Payment. 3. Set off. 4 and 5. Two counter claims for damages, commencing each plea and counter claim, "The defendant, except as to $450 parcel of the money claimed, says," etc.

The plaintiff obtained a summons from the Referee for leave to sign final judgment for the $450 without prejudice to proceeding in the action for the residue of the claim.

C. P. Wilson showed cause.

Cassidy supported the summons.

Sec. 36 of Q. B. Act, 1885, is wide enough to cover this case. "In any case, if it appears that the defence set up by the defendant applies only to part of the plaintiffs claim," etc. This is not limited to the cases provided for in the previous sections, nor to a defence set up on affidavit on a motion for judgment under those sections, but covers a defence set up by plea. In *Morris* v. *Armit*, 1886, (unreported), the plaintiff, in a precisely similar case, signed final judgment for the amount admitted, joined

issue on the pleas, and gave notice of trial as to the issues raised by the pleas. Wallbridge, C. J., dismissed a summons to set aside the notice of trial or the final judgment, and the plaintiff afterwards got judgment for the residue, and the two final judgments, as to the separate parts of the claim, are of record.

The Referee made the summons absolute.

The defendant obtained a summons by way of appeal.

Cassidy showed cause to the summons on same ground as before.

C. P. Wilson, for the appeal. If plaintiff could sign judgment he could do so without an order. In any case the motion to sign judgment should be dismissed as unnecessary, *Jenkins* v. *Ryan*, 5 M. R. 112. Word "any" in sec. 36, of Q. B. Act modified by context—*Stroud's Judicial Dictionary*, p. 29.

Held—

It appears to me that the statute does not apply except in case of motion for judgment, but even if it did apply the plaintiff would not require an order to entitle him to sign judgment.

Order of Referee reversed with costs and summons discharged with costs of original motion, all these costs to be set off against amount admitted by pleas.

SMART v. MOIR.

MAY 18, 1891.] [IN CHAMBERS—BAIN J.

Practice—Q. B. Act, sec. 36—Final judgment—Estoppel.

See preceeding case.

The plaintiff having signed final judgment and joined issue upon the pleas, the defendant obtained a summons from the Referee to set aside the joinder of issue and to show cause why the plaintiff's action, as to the residue of his claim put in issue by the pleas, should not be forever

stayed on the ground that the final judgment concluded the whole action; or why the defendant should not be at liberty to withdraw his pleas and replead the same with a plea that the plaintiff was estopped from further maintaining the action by the final judgment.

The Referee held the final judgment wrong, and that the defendant was entitled to his order, but the plaintiff asking to amend, an order was made setting aside the joinder, and allowing plaintiff two days to amend the judgment by making same interlocutory on payment of costs, and with leave to proceed with the action as to residue of claim.

The plaintiff amended accordingly and filed new joinder of issue.

The defendant obtained summons by way of appeal from that part of the order of the Reteree allowing the plaintiff to proceed, and to set aside proceedings thereunder.

C. P. Wilson for defendant, appellant. The Referee had no jurisdiction to allow the plaintiff to proceed. The suit was at an end when the final judgment was entered, and all plaintiffs claim was in the judgment and could not be resuscitated unless fraud or mistake shown so as to warrant equitable jurisdiction of court being exercised. The only mistake suggested was one of law against which a Court of Equity would not give relief. The term in the order as to leave to proceed decides in advance the question of the effect of signing the final judgment which we may wish to raise by plea of estoppel.. *King* v. *Davenant*, 4 Q. B. 402. *Whistler* v. *Hancock*, 3 Q. B., D. 83.

Cassidy, contra. An action is not out of court when final judgment is signed and the court can remove or amend it in any way at the instance of either party. It can do so at instance of party obtaining it so as to avoid an estoppel against him which it would otherwise consti-

tute. *Emery* v. *Webster*,, 9 Ex. 240; *Webster* v. *Emery*, 10 Ex. 901, and *Connan* v. *Reynolds*, 5 E. and B. 300.

Appeal dismissed without costs.

[Defendant is appealing to Full Court.—Ed.]

STOBART v. BRADFORD.

May 19, 1891.] [Bain, J.

Motion for injunction in Chambers.

The plaintiffs filed a bill to have an assignee removed, and a judgment recovered by him against his assignor declared fraudulent, or to be held for the general benefit of creditors, and for a receiver to be appointed. The assignee was the father of the insolvent, and the creditors claimed that he was so wrongfully conducting himself as assignee as to be unfit for the position, and asked that he be removed, shewing special instances of misconduct. Notice of motion was given for appointment of a receiver of the whole estate. The notice stated that the motion would be made before the presiding judge in chambers.

Culver, *Q. C.*, for assignee, objected that such a motion could not be made in chambers but must be made before the court.

Howell, *Q. C.*, and *Darby*, in reply.

Held—

The objection was fatal.

Motion dismissed upon special terms as to new motion.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

RE THE EMPIRE BREWING AND MALTING CO., LTD.

MAY 21, 1891.] [TAYLOR, C. J.

Winding-up Act—Settling priorities—Preferential lien.

Application at instance of liquidator to settle priorities of creditors under Winding-up Act.

Rourke & Cass claimed a preferential mechanic's lien for improvements and repairs on the company's buildings.

The amount of the claim was not disputed.

Elliott for the liquidator.

Ewart, Q. C., for claimants.

Phippen for certain of the creditors.

Judgment—

In my opinion the claimants are entitled to a preferential lien in respect of their claim. It was stated by counsel for the liquidators that there is no dispute as to the amount.

After the making of the winding-up order, they obtained leave to file a bill in order to preserve any lien they might have, according to the requirements of the

Mechanics' Lien Act, so Sec. 16(*a*) of the Winding-up Act cannot be invoked against them neither can Sec. 17,(*b*) for they have not put in force any attachment, sequestration, distress or execution.

I do not think that it can be said that, under Sec. 63, only mortgages, registered judgments or executions excepted from the operation of Sec. 66 are preserved or entitled to priority. That section must be read with reference to, and as the complement of, Sec. 62, which relates to the valuing of securities. Indeed, the wording of the section as to the property owned by such mortgagor being assigned to the creditors only subject to all previous mortgages, judgments, executions, hypothecs and liens thereon, holding rank and priority before his claim, and upon his binding himself to pay them, and securing the estate against every claim in respect of them, shows that other liens may exist and are preserved.

Nor does Sec. 66 interfere with the claim. That section only provides that, no lien, claim or privilege shall be created by the issue of any process or proceedings if the winding-up of the business of the company has commenced. The lien claimed here was created, not by the proceedings taken under the order giving leave to file the bill, but arose by virtue of doing the work and by the registration of a statement of claim under the provisions of the Mechanics' Lien Act, on the 27th Dec., 1890, three days before notice of the winding-up petition, which was, under Sec. 7 of the Winding-up Act, the commencement of the winding-up.

(*a*) 16. When the winding-up order is made, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court, and subject to such terms as the court imposes.

(*b*) 17. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void.

RE J. B. McCARTNEY.

MAY 22, 1891.] [FULL COURT—TAYLOR, C. J. KILLAM, J. BAIN, J.

Extradition Act—Forgery—Corroborative evidence—Judicial notice—Offence against laws of the United States.

Information laid under Extradition Act, on March 7, last, for forgery of certain promissory notes in Toledo, in State of Ohio. The prisoner was committed for extradition by Dubuc, J., see *ante*, vol. 1, p. 249, on the ground of his being accused of the crime of forgery and also of uttering what was forged, within the jurisdiction of the State of Ohio, one of the United States of America, and also of the United States of America.

The informations, depositions, warrants and other papers were returned by the learned judge to this court, under a writ of *certiorari*.

Howell, Q. C., and *Cumberland* moved absolute the rule for *habeas corpus*.

Perdue and *Cameron* for State of Ohio, in reply.

In support of the rule it was argued that there was no evidence to show that the Canadian Extradition Act was in force, there being no evidence that the Imperial Extradition Act has been suspended in Canada.

Held—

The case of *Re Stanbro*, 2 M. R. 1, is an answer to this objection. The provision therein referred to that Imperial orders in council published with the public statutes of Canada, as well as proclamations and acts of parliament, should be judicially taken notice of, is a reasonable and convenient one.

It was further argued that there was no evidence to show that the accused had committed the crime of forgery as recognised by the laws of the United States. Though

the evidence showed that according to the laws of the State of Ohio a forgery had been committed, yet there was no law of the United States, as a whole, under which the offence would be a crime.

Held—

1. That unless the treaty with the United States is to be made almost wholly useless and ineffectual it must be read "as a treaty made not only by the United States with Great Britain, but by each individual State of the Union, through the intermedium of the executive government of the United States with Great Britain," following Armour, C. J., in *Re Phipps*, 1 Ont., 608, and *Re Burke*, 6 M. R., 120.

2. The rule laid down in *Re Lee*, 5 Ont., 583, that evidence to corroborate that of the interested parties, in extradition proceedings was not necessary, should be followed. "I agree that the inquiry under that act, or that made by a J. P., to ascertain if the accused should be committed for trial do not strictly come within the 118th section of the Crim. Proc. Act, and that the 214th section of the latter is sufficient to make the evidence of the interested parties admissible upon such an enquiry, but I cannot think that a J. P. would be justified in committing for trial upon such evidence without something to show that some reasonable corroborating evidence, without which there could never be a conviction, was likely to be forthcoming upon the trial . . . . I think that when it was shown that, upon his arrest, the accused sent to the parties claiming to have been defrauded, the telegrams proved, the *onus* was thrown upon him to show that they could be explained by the existence of other proceedings, and that in the absence of such explanation the learned judge might well take them as corroborating the other evidence and make the committal now complained of."

Decision of Dubuc, J., confirmed; rule discharged.

RE LISGAR ELECTION PETITION.

MAY 22, 1891.] [FULL COURT—TAYLOR, C. J. DUBUC, J. BAIN, J.

Election petition—Preliminary objections—Name, residence and occupation of petitioner—Copy of petition necessary.

Election petition filed against the return of Arthur Wellington Ross as member for Lisgar.

Haggart and *Cassidy* for the respondent objected *inter alia*, (2) That the name, residence and occupation of the petitioner are not given, nor any means of identifying him. (5) That at the time of the presentation of the petition at the prothonotary's office, the petitioner did not leave a copy of the petition to be sent to the returning officer for publication, pursuant to the act of parliament.

Howell, Q. C., and *Cameron* for the petitioner.

Held—

1. It is essential that the petition should disclose the address and occupation of the petitioner so that the respondent may be able to ascertain who the petitioner is, and whether or not he is a person who is able to present a petition. Such an objection is not a formal or technical one. The status of the petitioner may be inquired into in the preliminary objections, which have to be filed within five days after the day of service, and in that time the respondent would not be able to ascertain who the petitioner was or whether he was a person entitled to vote or not, so as to decide whether objection should or should not be taken to his status.

2. By Dominion Controverted Elections Act, Sec. 9, s.s. (h), the clerk of the court must, on the presentation of the petition, send a copy to the returning officer for publication. The first of the English rules which, under Sec. 63, are in force in this province, requires the petitioner to leave a copy with the clerk to be sent to the returning

officer. Such a provision is imperative, and as no copy was so left in the present case, the objection is fatal, as is also the one first considered.

Petition dismissed with costs.

REGINA v. STARKEY.

MAY 23, 1891.] [FULL COURT—DUBUC, J. KILLAM, J. BAIN, J.

Liquor Licence Act 1889 — Jurisdiction — Quashing conviction — Prosecution commenced and information laid before one J. P. only.

Application by the Attorney-General to reverse decision of the Chief Justice, Nov. 21, 1890, and the rule issued thereon quashing a conviction under "The Liquor Licence Act 1889," and to restore the conviction.

That decision was obtained upon a rule *nisi* which called upon the convicting justices and the prosecution to show cause why a conviction should not be quashed, principally on the ground that the convicting justices "had no jurisdiction to hear and determine the matter of the said prosecution, information and complaint, because such prosecution was not brought before two justices of the peace, as required by the statute in that behalf, but the said prosecution was brought before one justice of the peace only, to wit, before the said Andrew Graham, as appears by the said information and complaint,"

By sec. 105 of the Liquor Licence Act, 1889, "all informations or complaints for the prosecution of any offence against any of the provisions of this act, except as herein specially provided, shall be in writing," and by sec. 106 "such prosecution may be brought before any police magistrate or before any two justices of the peace."

The defendant, on the trial, appeared and objected by counsel "that the prosecution was not properly brought before two justices of the peace as provided by law, in that

the information had been laid and taken before one of said justices only."

Mulock, Q. C., and *H. A. Maclean* for the Attorney-General.

Cassidy for the defendant. (1) The appeal is not properly constituted. The prosecutor and convicting justices, against whom the rule to quash the conviction was taken, do not appeal. The Attorney-General was not a party to the proceedings—we admit his right to be heard on a properly constituted appeal by the proper parties if the interests of the province are concerned, but he cannot intervene and of his own motion bring this appeal—the defendant might obtain an order for costs against the parties and prosecutor if they appealed, on dismissal of the appeal; to substitute the Attorney-General leaves the defendant without remedy for costs, for no order for costs can be made against the Attorney-General. (2) The court has no jurisdiction to entertain the present motion as there can be no appeal in a criminal case, and quashing the conviction amounted to an acquittal.

Held—

1. The Attorney-General was entitled to intervene, both because the prosecution was for the purpose of punishing a breach of a general public statute of the province, and because the province is interested in the penalty. Even in a civil suit, and though the crown is only indirectly interested, the Attorney-General is entitled to intervene. *Dixon* v. *Farrer*, 17 Q. B. D. 658, 18 Q. B. D. 43, and *Lord Bellamont's Case*, 2 Salk. 625.

2. The court had jurisdiction to hear the motion as it possesses all the jurisdiction of a superior court of law, differing thus from the courts of appeal having merely certain specified appellate jurisdiction. The learned chief justice having heard the matter under Q. B. Act, sec. 26, his decision was subject to reversal by the full court.

3.—Dubuc, J., dissenting—The initial step in the bringing of a prosecution is the laying or bringing before the justice or justices of the information, and it necessarily follows that to found jurisdiction to entertain a prosecution under the act in question it was absolutely necessary that the complaint or information should be brought to the attention of two justices of the peace and their authority invoked. Until it should be thus brought before two justices there was no jurisdiction of one, whether the one before whom the information was sworn, or another to summon the accused to answer the charge.

Application dismissed. Judgment of chief justice affirmed.

ALLOWAY v. CAMPBELL.

JUNE 13, 1891.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Tax sale—Effect of tax deed—Assessment of taxes—Validating acts.

Appeal by plaintiff from judgment of Bain, J., reported *ante*, p. 26, which see.

Howell, Q. C., and *Cumberland* for plaintiff.

Ewart, Q. C., and *C. P. Wilson* for defendants.

Held—

That the judgment of the court below should be affirmed. When a tax deed is relied on, proof must be given of taxes in arrears and unpaid, for which the land could legally be sold, and such proof cannot stop short of the first step essential to the legal imposition of the tax. Since it is necessary to show that at the time of the sale there were taxes due and unpaid, for which the land could be sold, then the taking of each step which it is by statute imperative to take for imposing the tax and making it a binding charge on the land must be proved. *McKay* v. *Chrysler*, 3 C. P. R. 436, commented upon.

According to *O'Brien* v. *Cogswell*, 17 S. C. R., 420, the evidence offered in the present case is not sufficient. If any of the formalities or requirements prescribed by the act have been omitted by any of the officers, the sale and the deed executed for the purpose of carrying it out are absolute nullities, unless it is directed in the statute itself that the step omitted is to be regarded as a non-essential, or unless the case comes within the terms of some provision enacted for the purpose of covering defects by failure to observe the procedure laid down by the statute. If the omission of any of the essential formalities or requirements prescribed in the act would render the deed relied on an absolute nullity, it must be necessary for the party relying on it to prove that they were duly observed, Sec. 673, of the Municipal Act, 1886, as amended, and Sec. 155, of the Assessment Act, only cure defects connected with the sale and the proceedings in and about the sale. Neither the collector's roll nor the list of arrears of taxes with the warrant to sell, afford sufficient *prima facie* proof that the lands were charged with taxes for which the sale might be made. To hold such evidence sufficient is to throw upon the opposite party the *onus* of proving negatives, which would, in many cases, be exceedingly difficult, while it would be usually very easy to prove the affirmatives, and in those cases where proof of the affirmative is difficult that of the negative becomes well nigh impossible.

Appeal dismissed with costs.

COMMERCIAL BANK v. BISSETT.

JUNE 13, 1891.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Promissory note—Presentation where no place named for payment.

Motion for reversal of judgment entered by Bain, J., at Brandon assizes.

The action was on certain promissory notes, made and dated at Brandon, and payable at "The Imperial Bank of Canada," only, no special place being stated.

Ewart, Q. C., for the defendants, objected that the notes should have been presented for payment at the head office of the bank in Toronto, out of the jurisdiction, instead of at the branch at Brandon.

Howell, Q. C., in reply.

Held—

The defendants could not have been misled. The notes, made and dated at Brandon, were made payable at the Imperial Bank of Canada, of which there is a branch at Brandon. In the absence of any evidence to the contrary it must be held that this was the place of payment.

Verdict affirmed, on this and other grounds, with costs.

REGINA v. PLANTE.

JUNE 13, 1891.] [FULL COURT—TAYLOR, C. J. DUBUC, J. BAIN, J.

Crown case reserved—Jurisdiction to hear—Effect of prior judgment on demurrer.

Crown case reserved by Hon. Mr. Justice Killam, from March assizes, under R. S. C., Cap. 174, Sec. 259, which provides that "every court before which any person is convicted . . . . may reserve any question of law, which arises on the trial, for the consideration of the justices of the court for crown cases reserved." The question arose after the prisoner had pleaded, and so after issue had been joined between the prisoner and the crown, and while the jury was being empanelled to try that issue. The last juror called was challenged by the prisoner on the ground that six of the jurors already sworn were not skilled in the French language, and that this juror also was unskilled in the French language. This challenge

was demurred to by the crown and judgment for the crown was given on the demurrer, and also on a demurrer to a challenge to the array, though the questions raised were reserved as follows:

1. Did the written challenge to the array state a sufficient ground of objection to the array of jurors summoned to attend the court?

2. Was the prisoner entitled to be tried by a jury composed for the one-half at least of persons skilled in the language of the defence in case that language was the French language?

Cameron for the Attorney-General argued that the court had no jurisdiction to dispose of the questions raised in the form in which they are presented, because the case stated does not reserve any question of law which arose at the trial.

Hagel, Q. C., and *Bonnar* in reply.

Held—Dubuc, J. dissenting—

The court has not power to consider a question of law which arose on demurrer, and judgment on which has been given on demurrer in the court below, and it is only in error that the judgment on the record can be reversed.

Per Taylor, C. J. "The court cannot, upon a case reserved, entertain any question but one strictly arising on the trial. The cases are conflicting, but on the whole it seems to me that, giving the act a liberal construction, the question raised in the case stated is one which could be reserved.

"But the difficulty is that there having been a challenge to the polls, which was demurred to and the demurrer overruled, it became a matter of record. That seems to be what must determine whether the court can deal with the question in the form in which it is now presented. . . . *Reg.* v. *Manning*, 1 Den. C. C., 467

. . . . being expressly distinguished by *Reg.* v. *Faderman*, 14 Jur., 377, . . . as a case in which there was no judgment on the demurrer. The court held that they had no power on a reserved case to review a judgment on demurrer, where the party could pursue his remedy by writ of error. The judgment of Wilson, C. J. in *Reg.* v. *O'Rourke*, 32 C. P., 388, seems to be placed on the same ground.

The only judgment which, in my opinion, can be given is that the case be quashed."

RE SHAW.

JUNE 13, 1891.] [FULL COURT—TAYLOR, C. J. DUBUC, J. BAIN, J.

Certiorari—By-law and provincial statute against keeping a common gaming house—Ultra Vires.

Appeal by prosecutors from judgment of Killam, J., *ante* vol. 1, p. 233, granting prisoner an order for certiorari to issue in order to move to quash conviction "for that he did unlawfully keep a gambling house in the city of Winnipeg, contrary to the provisions of by-law No. 55, of the city of Winnipeg, in such case made and provided."

A consent was signed by the attorneys for the prosecution and the defence that the above order "be set down for rehearing as if the same contained a provision for the quashing of the conviction, and so that the jurisdiction and right to make said conviction may be argued upon rehearing as fully and in all respects as if said writ of certiorari had issued and upon the rehearing thereof the said conviction had been quashed."

The case was argued in accordance with the terms of this consent.

Howell, Q. C., and *Isaac Campbell* for the city of Winnipeg.

C. P. Wilson for the prisoner. The offence of having unlawfully kept a gambling house, of which the prisoner is convicted, is an offence that falls within the subject of "the criminal laws" under B. N. A. Act, sec. 91, s.s. 27, and therefore a matter for the parliament of Canada and beyond the jurisdiction of the Provincial Legislature to authorize the city to pass a by-law making it an offence to keep a gambling house. 37 Vic., c. 7, s. 96, s.s. 8; 45 Vic., c. 36, s. 101, s.s. 8; 47 Vic., c. 78, s. 149, s.s. 13, and present Municipal Act 53 Vic., c. 51, s. 375, s.s. 39.

Held—

1. Keeping a common gaming house is an offence at common law and keeping a gambling house is the same thing as keeping a common gaming house.

2. The term "criminal law" used in said sec. 91 must include every act or omission which was regarded as criminal by the laws of the provinces when the B. N. A. Act was passed and which was not merely an offence against a by-law of a local authority. *Reg.* v. *Mason*, 17 A. R. 211, distinguished.

3. Keeping a gambling house being an offence against the general criminal law, to be dealt with by the Parliament of Canada, cannot be made an offence by a provincial act or by a municipal by-law under the authority of such act. To hold that an offence may be one under the general criminal law and also one under a by-law would seem to render an offender liable to be punished twice for the same offence. *Regina* v. *Boardman*, 30 U. C. R. 553; *Brooke* v. *Bowmanville*, 38 U. C. R. 580; *Regina* v. *Roddy*, 41 U. C. R. 291; *Regina* v. *Matheson*, 4 O. R. 559, and *Jenks* v. *Turpin*, 14 Q. B. D. 505, considered. *Cooley on Limitations*, 5 Ed., p. 241; *Hawkins*, P. C., c. 75, s. 6, and *Bacon's Abrid.*—Nuisance, A.

4. It does not follow from holding that the Provincial Legislature cannot make keeping a gambling house ar

offence, that the act authorising the by-law has no force, as many things might be done for the purpose of suppressing gambling houses other than the punishment for keeping one.

5. The evidence showed that the defendant was keeping a gambling house and guilty of an offence which could be dealt with under R. S. Can., c. 158.

Appeal dismissed.

PRACTICE.

LABATT v. CHISHOLM.

MAY 20, 1891.] [DUBUC, J.

Prohibition—Transcript of judgment from County Court—Effect of.

Application to set aside judgment in Queen's Bench, transferred from County court of Selkirk.

Mulock, Q. C., for defendant, for the motion.

Gilmour for plaintiff, *contra.*

Judgment—

The question of the jurisdiction of the County Court of the County of Selkirk in this case has been disposed of by the writ of prohibition, granted by my brother, Bain.

The plaintiff contends that by the filing with the Prothonotary of this court of a transcript of the judgment of the County Court, the said judgment became a judgment of this court and the writ of prohibition can have no effect on the same.

I think that would be a dangerous doctrine to adopt. The judgment now existing in this court, is nothing more

than the judgment of the County Court transferred from that court. By the writ of prohibition it was declared that the County Court had no jurisdiction in the cause. The judgment in that court became, therefore, now of no effect, and could not be enforced. That judgment of the County Court was, of course, the basis and foundation of the judgment of this court now sought to be set aside. Can I hold that a judgment, the basis and foundation of which has been destroyed and wiped out, is still valid? I do not think so. The arguments used by Mr. Gilmour might have been urged against the granting of the writ of prohibition, but are not available here.

The case of *Bridge* v. *Branch*, 1, C. P. D. 633, appears to me to be in point.

I think the said judgment should be set aside with costs.

RE JOHN HENDERSON.

MAY 27, 1891.] [BAIN, J.

Tax sale—Certificate and payment out of overplus taxes.

The facts in this case fully appear in the judgment.

Howell, Q. C., and *James*, for applicant.

C. P. Wilson for the Attorney-General.

Judgment—

This is a petition under Sec. 675, of the Municipal Act of 1886, for an order declaring the petitioner to have been the lawful owner of certain lands sold for arrears of taxes, by the City of Winnipeg, in October, 1888, and requiring the city to pay to him the surplus purchase money in such sale, amounting to $22.45.

It is not questioned that the petitioner is entitled to these moneys, but the application is opposed on behalf of the Attorney-General, on the ground that the application should have been made to the District Registrar, under Sec. 158 of the Assessment Act of 1890.

The sale of the lands was made under the authority of the act of 1886, and this act was repealed by Sec. 475 of "The Municipal Act," 1890, with the usual proviso that rights acquired under the repealed act should remain valid and might be enforced. The Assessment Act of 1890 confers powers upon the councils of municipalities to assess and tax lands and to sell lands for arrears of taxes, but Sec. 164 provides that all tax sales held "prior to the coming into force of the act, shall be continued, completed, acted upon and dealt with" under the provisions of Cap. 52, of 49 Vic., the Municipol Act of 1886, notwithstanding its repeal.

Section 157 of the Assessment Act directs the treasurer of the municipality to keep an account of moneys received by him on the sale of lands over and above the amounts due for arrears of taxes and costs; and Sec. 158 provides that the owner, heir, assignee, or legal representative of the owner of any parcel of land "sold for arrears of taxes, and conveyed as aforesaid," shall be entitled to receive the amount held to the credit of that parcel "upon producing and leaving with the treasurer an order signed by the District Registrar, if the land is in a Land Titles District, and by a Judge of the County Court of the district, if the land is not in a Land Titles District, setting out that it had been proved to the satisfaction of such District Registrar or Judge, that the claimant was, at the time of sale, the owner of the land or the legal representative of the owner." Under the act of 1886, Sec. 675, claimants for these surplus tax moneys had to obtain orders from a Judge of the Court of Queen's Bench, and the change of practice that is made by the Assessment Act will be found to be convenient and reasonable, especially in cases where the lands are in Land Titles Districts. But the application of Sec. 158, of the Assessment Act, seems to be limited to cases in which lands have been sold for arrears

of taxes under the provisions of that act. I have not found anything in the preceding sections of the act that would show that the words in Sec. 158, "sold for arrears of taxes and conveyed as aforesaid," should apply to sales other than those held under the authority of the act, and as by the 164 Sec., as we have seen, all sales held prior to the coming into force of the Assessment Act, are to be completed, acted upon and dealt with under the act of 1886, the Assessment Act is not intended to refer or apply at all to sales held prior to its coming into effect. I think, therefore, that the District Registrars or County Court Judges have jurisdiction to make these orders for payment only in cases where the lands have been sold under the provisions of the Assessment Act, and that by the direction of Sec. 164, that past tax sales are to be completed, acted upon and dealt with under the provisions of the act of 1886; the intention is shown that orders for the payment of balances remaining from sales held prior to the Assessment Act, are still to be obtained as provided in Sec. 675 of the act of 1886.

On a certificate or abstract being filed, showing that the petitioner was the owner of the land in question, at the time of sale, I will make an order for the payment of the money in the treasurer's hands. It was agreed by counsel that there should be no costs.

BALFOUR v. DRUMMOND.

JUNE 4, 1891.] [IN CHAMBERS—DUBUC, J.

Appeal to Supreme Court—Payment out of security when appeal taken to Privy Council.

Defendant served notice of motion for the payment out of $500 security, paid into court by them on an appeal to Supreme Court, on which they had succeeded.

McLeod for the motion.

The ... *Held* for plaintiff opposed the application on the ground that plaintiff intended to appeal to Privy Council, and no order for payment out should be made till such appeal was decided.

the act ... "The ... right ... an ... c ...

Held—

That the defendants were entitled to an order for payment out with costs of motion, the money having been paid in merely as security for the costs of an appeal to a particular court in which they had succeeded.

PION v. ROMIEUX.

June 4, 1891.] [Dubuc, J.

Practice—Pleading—Effect of plea of payment—Joinder of issue on plea of payment into court—Amendment.

Declaration, common counts. Pleas, *inter alia*, payment, and payment into court.

Munson for plaintiff objected at the hearing that the plea of payment only entitled defendant to the items of their accounts which had been paid to the plaintiff, and that amounts paid to third parties could only be allowed under a plea of set-off.

Huggard for the defendant.

The plaintiff should have put in a special replication to the plea of payment into court; joining issue as he did was no answer to such a plea.

Held—

1. The plea of payment is sufficient.

By rule 13, Trin. Term, 1853, it is not necessary to plead payment or set-off of any sums of money which plaintiff shall have given credit for in the particulars of demand, *Archbold's Pr.*, 259, 1458, which he has given in this case.

2. "I am not clear whether the general replication by joinder of issue to such a plea is bad. If so, I am inclined

to think that the proper step to be taken by the defendants in such a contingency would have been either to sign judgment of *non-pros.*, or to demur. If, however, it was found necessary that a special replication should be on the record, I am of opinion that at this stage of the proceedings, under section 222 of the C. L. P. Act, 1852, it should only be a question of amendment, on payment of costs. See also *Archbold's Pr.*, 1561. I would, in this case, in the terms of said section 222, allow such amendment as might be necessary for the purpose of determining the real question in controversy between the parties. I think the plaintiff is entitled to a verdict for $130."

GENDRON v. MANITOBA MILLING Co.

JUNE 6, 1891.] [IN CHAMBERS—TAYLOR, C. J.

Commission—Suppression of—Oath of commissioner—Manner of taking depositions.

Appeal from order of Referee suppressing depositions taken under a foreign commission, on the grounds (1) That the commissioner did not take the prescribed oath; and (2) that the questions and answers were not reduced to writing as directed by the commission. The Referee had not dealt with the second objection, but made his order on the first.

Patterson for plaintiff, appellant, argued that the oath—which was taken before the joint prothonotaries of the Superior Court, in the District of St. Francis, P. Q., who affixed the seal of the court to the same—was properly taken, and if not, that no oath need be taken.

The statute 1 Wm. 4, C. 22, does not require an oath to be taken, and the order does not require one, so it may be said it was, even if usual, dispensed with; quoting *Greville* v. *Stulz*, 11 Q. B. 997; *Howkins* v. *Baldwin*, 16 Q. B. 375, and *Doe d. Lemoine* v. *Raymond*, 5 O. S. 336.

Cumberland for defendants, respondents.

Held—

1. The taking of the oath by the commissioner before entering on the discharge of his duty is imperative, unless expressly dispensed with by the order; or where the commission has been addressed to the judges of a foreign court, or to the foreign court itself, in which cases the whole form of the commission is altered, *Clay* v. *Stephenson*, 3 A. and E. 807; *Ponsford* v. *O'Connor*, 5 M. and W. 673; *Boclen* v. *Melladew*, 10 C. B. 898; *Lumley* v. *Gye*, 3 E. and B. 114, and *Beard* v. *Steele*, 34 U. C. R. 43, considered.

2. The oath here professed to be taken was taken before persons who had no jurisdiction or authority to administer it, and it is the same as if no oath had been taken.

3. The commissioner having been directed to reduce the questions and answers to writing, and his not having done this throughout, but some having been taken in narrative form, was a sufficient ground for suppressing the depositions. The defendants are deprived of the right to object at the trial to leading questions if any were put; such an objection can be taken at the trial, and a party is not there precluded from taking such an objection on the ground that he was represented on the taking of the evidence. *Robinson* v. *Davies*, 5 Q. B. D. 26; *Mercer* v. *Fonseca*, 2 M. R. 169, and *Hutchinson* v. *Bernard*, 2 Moo. & R. 1.

Order affirmed; appeal dismissed; costs to be costs in cause to defendant in any event.

SCOTT v. THOMPSON.

JUNE 18, 1891.] [IN CHAMBERS—BAIN, J.

Jury—Order for obtained ex parte—Jurisdiction of referee.

Morice for plaintiff obtained, on June 12, an *ex parte* order from Referee, under 54 Vic., Cap. 1, sec. 33, directing the issues to be tried by a jury.

Issue had been joined on June 9.

Cassidy for defendant on June 16 took out summons from Taylor, C. J., to rescind the order of the Referee on the ground that he had no jurisdiction to make such an order; and in any event such an order should not be made *ex parte.*

Morice showed cause, and relied on 52 Vic, Cap. 29, and Q. B. Rules 92, *et seq.*, made thereunder.

Cassidy in reply. The rules in question only authorized the referee to exercise such jurisdiction as a judge could have exercised in chambers at the date of the passing of the rules.

Held—

Both objections fatal. Summons made absolute.

HURTLEY v. HILL.

JUNE 22, 1891.] [THE REFEREE.

Summons to sign final judgment—Order for judgment for amount within jurisdiction of county court—Costs.

Plaintiff sued in Queen's Bench for $500. Defendant appeared and plaintiff took out summons to sign final judgment. An order was made allowing plaintiff to sign judgment for $139.00, an amount within the jurisdiction of the county court, and he then abandoned as to residue of his claim.

Munroe for plaintiff.

Kennedy, Q. C., for defendant Currie.

Howden for defendant Hill.

Held—

1. That the plaintiff having only succeeded in an amount within the jurisdiction of the county court, he was not entitled to the cost of this motion, and only to the county court costs of the action, to be taxed by the Master

subject to defendant's right of set off for costs of defence in this court.

2. That had the plaintiff taken his order for final judgment for the sum of $139, and proceeded for the balance of his claim, the question of costs would have been resorved till after the termination of the action, as the question as to whether plaintiff would be entitled to Queen's Bench or county court costs could not be determined till then.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

N. W. TERRITORIES. SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

FERGUSON v. FAIRCHILD.

MAY 4, 1891.] [ROULEAU, J.

Partnership—Promissory note—Liability of firm on note made by manager.

The plaintiffs sued the defendants trading, in copartnership with one W. D. Rorison, as "The Otter Tail Lumber Company," on the following note, as well as on an account for $311.90.

$407.29 CALGARY, 9TH OCTOBER, 1889.

Sixty days after date we promise to pay to Dolan and Barr, or order, four hundred and seven 29-100 dollars, at the Imperial Bank here.

Value received. W. D. RORISON,
Manager, Otter Tail L. Co.

McCarthy, Q. C., and *Beck* for plaintiffs.

Davis and *Bangs*, for defendants, argued that as a matter of law the note sued on was not, on the face of it, made by the defendants, nor did it purport to be made by or on behalf of them, but was the personal note of W. D. Rorison.

Held—

Looking at the terms of the note itself it does not on its face purport to be a personal contract. If it had been made on some consideration moving towards Rorison personally, it would have been signed "W. D. Rorison" and no more. The words "we promise" are used in the body of the note, and unless intended to be the company's note and not Rorison's, it would not have been signed as "Manager, Otter Tail L. Co." *Alexander* v. *Sizer*, 4 Ex. 102 followed.

The objection in law is not well taken and should be dismissed.

It was objected as against the account for $311.90 that The Otter Tail Lumber Company was a manufacturing lumber company, and that one of the partners could not bind the company by incurring debts for groceries and other merchandise supplied to the men employed by the company, unless authorized by his co-partners.

Held—

Under the circumstances of the case and the manner and necessities of conducting the business of the company, as shown by the evidence, the manager could, following the general principles laid down by *Lindley on Partnership*, p. 194, bind the company for such expenses.

Verdict for plaintiffs for full amount with costs.

EXCHEQUER COURT OF CANADA.*

REGINA v. McCURDY.

JUNE 22, 1891.] [BURBIDGE, J.

The Expropriation Act, R. S. C. c. 39.—Assignment of rights of land expropriated previously acquired by lease—Effect of new leases between same parties—Compensation—Assignment of chose in action against the Crown—Evidence.

An agreement by a proprietor to sell land to the Crown for a public work, followed by immediate possession, and, within a year, by a deed of surrender, is sufficient under the *Expropriation Act* s. 6, R. S. C. 39, to vest the title to such land in the Crown, and to defeat a conveyance thereof made subsequent to such agreement and possession, but prior to such surrender.

Under section 11 of the said act, the compensation money, for any land acquired or taken for a public work, stands in the stead of such land, and any claim to or incumbrance upon such land is converted into a claim to compensation, and such claim once created continues to exist as something distinct from the land and is not affected by any subsequent transfer or surrender of such land. *Partridge* v. *The Great Western Railway Co.*, 8 U. C. C. P. 97; *Dixon* v. *Baltimore and Potomac Railway Co.*, 1 Mackey 78, referred to.

2. Where a *chose in action* was assigned, *inter alia*, for the general benefit of creditors and all the parties interested were before the Court, and the Crown made no objection, the Court gave effect to such assignment.

Quaere. In the absence of acquiescence in such an assignment are the assignee's rights thereunder capable of enforcement against the Crown?

*Kindly furnished by Charles Morse, Esq., reporter of the Exchequer Court.

3. In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land; *Brown* v. *The Commissioners of Railways*, 15 App. Cas. 240 referred to. Where, however, such tests or experiments have not been resorted to, the Court, or jury, must find the facts as best it can from the indications and probabilities disclosed by the evidence.

MARTIN v. REGINAM.

JUNE 25, 1891.] [BURBIDGE, J.

Injury to person on a public work—Negligence of servant of the Crown—Brakesman's duty in putting children off car when trespassers—Damages.

1. The Crown is liable for an injury to the person, received on a public work, resulting from negligence of which its officer or servant, while acting within the scope of his duty or employment, is guilty. *City of Quebec* v. *The Queen*, 2 Ex. R. 252 referred to.

2. One who forces a child to jump off a railway carriage while it is in motion is guilty of negligence.

3. The fact that the child had no right to be upon such carriage is no defence to an action for an injury resulting from such negligence.

MANITOBA.

RE MAGNUS BROWN, DECEASED.

JUNE 24, 1891.] [TAYLOR, C. J.

Will—Bequest of residuary estate to trustees—Effect of—Rights of next of kin.

Case submitted for the opinion of the court on construction of a will.

A testator after appointing two persons "hereinafter called my trustees, to be executors and trustees of this my

will," and declaring that all trusts and powers reposed and vested in them might be executed by the survivor of them or the executors or administrators of such survivor, or other the trustee or trustees for the time being of his will, proceeded thus: "I give, devise and bequeath all my lands, chattels real, real and personal estate unto my trustees upon trust that my trustees shall sell and call in and convert the same into money . . . and shall and will out of such moneys produced by such sale, calling in, and conversion, and with and out of my ready money, pay all my funeral and testamentary expenses and debts and the legacies bequeathed by this my will, or any codicil hereto, and shall at their discretion invest the residue. . . . . and shall stand possessed of the said residuary trust moneys and investments for the time being, representing the same upon the trusts following (that is to say): In trust to pay the net annual income to my dearly beloved wife, Ann Brown, during her life, and from and after her decease, in trust for the persons, interests and purposes hereinafter mentioned," and after giving a number of legacies proceeded, "subject to the foregoing trusts in favor of my said wife and the payment of my funeral and tertamentary expenses, debts and legacies and directions as aforesaid, I give all my lands, chattels real, real and personal estate unto my trustees to be applied and disposed of as to them in their uncontrolled and absolute discretion shall seem best."

The widow died, the legacies and all possible charges on the estate were paid and a considerable surplus was left in the hands of the executors and trustees.

Perdue, for the executors, argued that under the above clause they had an absolute disposing power over the residuary estate not subject to any trusts whatsoever, quoting *Gibbs* v. *Ramsay*, 2 V. & B. 294.

McPhillips, for next of kin, and

Hough, for William Brown, surviving brother of deceased, contended that the residuary estate should be divided among the next of kin.

Held—

"In my opinion it must be held that, under the will now in question, the executors and trustees have not an absolute disposing power over the residuary estate, but hold it in trust. Questions arising on the construction of wills are not easy of decision. The language used by different testators is often so much alike and yet so varied that reported cases upon wills are often misleading guides. In disposing of such a question as is raised here, however, it must be borne in mind that the leaning of the courts is always in favour of upholding a trust. More than a hundred years ago Lord Thurlow, in *Dean* v. *Dalton*, 2 Bro. C. C. 636, note, is reported as having said respecting a question of executors having a beneficial interest, 'Any expressions that can be catched in a will are sufficient to turn executors into trustees.' In *Mapp* v. *Elcock*, 3 H. L. 490, Lord Truro, referring to the 11 Geo. 4 and 1 Wm. 4, c. 40, having altered the rule as to the persons on whom the onus rested, spoke of it as showing 'that in doubtful cases the leaning ought to have been rather against than in favor of the executor.' Mr. Justice Story says (Eq. Jur. s. 1208) that the inclination of Courts of Equity has been strongly evinced to lay hold of any circumstances to rebut the presumption of a gift to an executor for his own benefit.

All parties who were represented on the argument are entitled to their costs out of the estate."

RE R. L. ASHBAUGH, AN ATTORNEY.

JUNE 24, 1891.] [TAYLOR, C. J.

Attorney and Barrister—Striking off rolls—Criminal charge—Master's report.

Appeal of Roderick Leander Ashbaugh, an attorney, from the report of the Master certifying that the conduct

of the attorney in and about certain criminal proceedings before the Police Magistrate of the city of Winnipeg, in which certain persons were charged with an attempt to kill and murder, was such as to render him unworthy of remaining on the Rolls of Barristers and Attorneys of this Province.

For full text of Master's report see Vol. I, pp. 252-3.

Howell, Q. C., and *Wade* for the Law Society.

Ewart, Q. C., for the defendant.

Held—

Though the Master's report seemed defective in that it did not find specifically in what way the attorney acted improperly, or what the conduct was which rendered him unworthy of remaining on the Roll, yet the hands of the Court are not on that account tied, nor does it seem necessary to refer the matter back for a more specific finding. The Court may review the whole evidence and arrive at its finding without regard to the Master's report; though generally accepted, the Court is not bound to act upon it. *Re Simmons*, 15 Q. B. D. 350. The Court could give a judgment making the general finding of the Master specific in terms, for, by the appeal, the whole evidence is before the Court.

The charge preferred against the attorney was that he, being employed to act for the prosecutor on a charge of a serious felony, took from the accused a large sum of money to procure an abandonment of the charge, and his conduct therein was calculated to subvert the administration of justice, and was extortionate.

The learned Judge, after an exhaustive review of the evidence concluded his judgment as follows:

"From the whole evidence there can be no doubt that all the time the accused were in jail the payment of money for the purpose of getting the prosecution abandoned was a subject of discussion. The accused and their friends

were willing to pay. The proposal for such a settlement of the case may not have come from the attorney in the first instance, but that he was willing to be a party to it there can be no doubt. If not, why was he visiting and holding private interviews in jail with the accused, the man he had been retained to prosecute? The accused, though willing to pay were not willing to pay the large sums mentioned. Then Velie resolved to drop the prosecution as he says he did, or as he may have been advised to do so. The attorney did not at once go to the jail and inform McKeown as he said he did. On the contrary, he, as plainly proved by Lawlor, at the interview on the evening of the 11th was insisting that the prosecution should proceed. That, McKeown says, was because the payment of $2,500 would not be agreed to. Then there can be, I think, no doubt that an arrangement was come to with the friends of the accused for the payment of $1,500 in consideration of which the attorney was to drop the serious charge and substitute another of damage to property, something he had already instructions from his client to do. In pursuance of this agreement the money was paid to him.

It is urged that there can have been no such bargain, for the prosecution on the serious charge was actually proceeded with on the 12th. No doubt it was, and some evidence given, but may that not have been merely as a blind to cloak over the transaction, or may it not have been that on the morning of the 12th the money or proper security for the payment was not forthcoming? Some evidence was given at the Police Court, and then there was an adjournment, after which the statement was made that no further evidence would be offered. During the adjournment there seems to have been an interview between the attorney and the friends of the accused.

On the evidence the finding must be that there was an

agreement between the attorney and the friends of the accused that the prosecution should be abandoned on consideration of the payment to him of a sum of money, and that in pursuance of such agreement $500 was paid to him.

The rule must be made absolute to strike him off the Roll of Attorneys. As to so much of it as seeks to strike him off the Roll of Barristers, he was in the present case acting as an attorney, and I do not feel that I can, consistently with the decision of the Full Court, *In re J(ohn) B(oultbee)*, 6 M. R. 19, strike him off the Barrister's Roll. It seems an anomaly that a man unworthy to remain on the one can be left on the other, but the opinion of the Full Court was that under the statute as it is at present worded it must be so."

[See remarks in June issue, p. 82. The attorney appealed to Full Court, and matter has been argued and stands for judgment, pending which we hold over a further consideration of this case.—ED.]

PETERSON v. GIBSON.

JUNE 24, 1891.] [KILLAM, J.

Real Property Act—Petitioner let in to redeem—Effect of contracts of purchase without transfer issuing—Adjournment of hearing.

Hearing of petition under Real Property Act.

C. P. Wilson for petitioner, cavetor.

Culver, Q. C., for respondent, caveatee.

Judgment—

It appears to me that, as between Mrs. Gibson and the petitioner, the certificate of title should not be allowed to prevent the petitioner being let in to redeem. This seems to result naturally from the principles laid down in *Re Massey & Gibson*,* 7 M. R. As between them I see nothing to prevent this being done upon a motion to set aside the final order of foreclosure, whether the ground of

*Vol 1, p. 164.

the application be the want of notice relied on, or the alleged breach of faith. Such motions are very common. But two parties allege that they have made contracts of purchase of portions of the lands, paid money on account, entered into possession and made improvements thereon, relying on the certificate of title. They do not show that they have received any transfers, and apparently from the language of their affidavits they have not. It does not appear to me that they are parties who are entitled to oppose redemption, or to be heard upon any application to set aside the final order of foreclosure. Their contracts of purchase are matters between themselves and the mortgagee alone, and they must, as against third parties claiming adversely to and not under the mortgage, rely upon such title as the mortgagee can give them. The order authorizing the proceedings shows only that Mrs. Gibson applied to have a transfer of other portions of the land registered, but there is nothing to show that any person had acquired any interest under any such transfer.

The hearing of the petition should be adjourned to enable the petitioner to make any motion that he may desire for the discharge of the final order of foreclosure.

STOBART v. BRADFORD.

JUNE 24, 1891.] [TAYLOR, C. J.

Bill for removal of trustee—Parties to—Grounds for removal—Distress for rent—Three months exemption—Surrender of term—Appointment of receiver.

Bill filed by execution creditor to remove one of the defendants, Henry Bradford, a trustee, from that position, for improper conduct, and to declare certain claims of his against the estate to be null and void, and for the appointment of a receiver.

The defendant, Charles A. Bradford, made an assignment to his father and co-defendant, Henry Bradford, as trustee for the creditors.

Culver, Q. C., and *Coldwell*, for defendants, objected that Charles Bradford was not a proper party on the authority of *Weise* v. *Wardle*, L. R. 19 Eq. 171; *Burstall* v. *Beyfus*, 26 Ch. D. 35; and *Commercial Bank* v. *Cook*, 9 Gr. 524, and the bill should be dismissed as against him.

Howell, Q. C., and *Darby*, for plaintiffs, in reply.

Held—

The answer to such an objection is that the bill seeks to remove a trustee as an unfit person and to appoint a receiver, and in such case the *cestui qui trusts* are the persons interested of whom the defendant, Charles Bradford, is one, he being entitled to any surplus after payment of the creditors. That the plaintiffs may not be entitled to recover costs against him, as prayed, cannot, if he is otherwise a proper party, call for the bill being dismissed against him.

The trustee made a claim against the estate for five years arrears of rent.

Held—

1. The making of the assignment would not operate as a surrender of the lease. The assignee was the landlord, but under the assignment he was a trustee for the creditors of the tenant's interest as lessee.

2. 47 Vic. c. 27 s. 5, under which it was contended that the landlord could not distrain for more than three months rent is ambiguous in its terms. It may be read as meaning that in two cases no more shall be recovered than three months rent, that no one shall be at liberty to distrain for more, and that no one shall claim against an execution or attachment for more; or it may read that no one shall distrain, or claim against an execution or attachment, for more than three months rent. The statute being ambiguous should be read so as to make the least change in the law as it previously existed, and should be read as preventing a claim against an execution or

attachment for more than three months rent, leaving the right of the landlord in other cases unaffected.

The claim for rent is valid.

The trustee made a second claim for $975 for moneys due on promissory notes made by debtor and for which he, by the assistance of the debtor, recovered a judgment. The learned Judge determinsd on the evidence that this claim was an unfounded one and could not rank against the estate, and that the trustee had on his own showing appropriated $80 of the money of the estate received by him to retire a private note on which he was liable. Among other circumstances it appeared that his own solicitors had advised him to transfer the trust.

Held—

It was no answer to such appropriation to say that there was no concealment of such action, or that the trustee could make the amount good, and it was improper so to act. The fact that the trustee obstinately clung to his position as assignee in face of the above circumstances could only be construed in a way unfavourable to the trustee, and that it was for an improper motive that he did so. He should not be continued in his office.

Decree for appointment of a receiver by the Master, with costs against Henry Bradford, the trustee.

RE JOHN HENDERSON.

JULY 16, 1891.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Tax sale—Certificate and payment out of surplus taxes.

Appeal by City of Winnipeg from order and judgment of Bain, J., reported *ante*, p. 55.

Howell, Q. C., for applicant for tax surplus.

Campbell, Q. C., for City of Winnipeg.

C. P. Wilson, for the Attorney-General.

On the case being called the learned Chief Justice pointed out that it did not appear that the Court had jurisdiction to entertain the appeal, and, the matter having been discussed at some length, it was

Held—

That neither under secs. 675, 676 or 677 of Munic. Act of 1886, or under analogous sections of the Assessment Act of 1890, did the Court have jurisdiction to entertain an appeal from the order of a Judge made on a petition presented under above acts. The petition is presented to a Judge of the Court; the Court of Queen's Bench as such does not become seized of it, and therefore the inherent jurisdiction to review all matters pending in the Court would not apply unless special provision for such review were contained in the statute. The statute is silent as to appeal.

PRACTICE.

STOBART v. BRADFORD.

JULY 13, 1891.] [TAYLOR, C. J.

Practice—Settling minutes of decree—Directions to receiver.

Application to settle minutes of decree. See *ante*, p. 72.

Howell, Q. C., and *Darby*, for plaintiff.

Culver, Q. C., for defendants.

Judgment—

When judgment was given I said in answer to a question by Mr. Culver, that the receiver, when appointed, must get the estate out of the hands of the sheriff as he could. On reflection there seems to be no objection to ordering him to deliver it over, all parties interested are before the Court, the interpleader order cannot now be acted on, the plaintiffs are not proceeding with their

attachment, and the claims of Henry Bradford are disposed of, his claim for rent and to priority for payment of that is decided in his favour. The claim under the judgment has been decided against him.

As to the account of his dealings, that is a necessary direction consequential upon the relief given by the appointment of a receiver, and no special prayer for that was necessary.

O'BRIEN v. GILLIES.

JULY 16, 1891.] [TAYLOR, C. J.

Demurrer—Equitable plea—Agreement not to take legal proceedings.

Declaration on common counts. Third plea on equitable grounds alleging that plaintiff agreed not to commence legal proceedings till after the happening of certain events.

Demurrer thereto.

Cameron for plaintiffs. The plea is not a good equitable plea as it does not disclose grounds on which the defendant would be entitled to an absolute, unconditional and perpetual injunction. It discloses no defence, but, if anything, only a right of action for breach of contract not to sue. It is in reality a plea of release, therefore, one at law, and should not be pleaded on equitable grounds.

Perdue for defendant. While the plea may not be a good plea at law, it is pleaded as an equitable plea, and as such raises a good defence to the action.

49 Vic., c. 14, s. 2 provides that any party to any action at law may, by plea or any subsequent pleading, set up facts which entitle him to relief upon equitable grounds, although such facts may not entitle him to an absolute, perpetual and unconditional injunction in a court of equity.

Held—

1. The breach of an agreement not to sue renders the party liable in damages and that an agreement not to sue

generally may be pleaded in bar is to avoid circuity of action.

2. The damages for breach of such an agreement would be equal to the debt or sum to be recovered in the action agreed to be forborne. *Smith* v. *Maplehack* 1 T. R. 44. The damages for breach of an agreement not to sue for a limited time only would not necessarily be the same amount, but would equally render the party liable to damages. *Deux* v. *Jefferies*, Cro. Eliz. 352.

3. The defendant is entitled on the facts set up on this plea being proved to damages for breach of contract. He has a plain and adequate remedy at law, and that being the case, equity will not interfere. The plea then does not set up facts which entitle the defendant to relief upon equitable grounds, even if it is not necessary to show that he would be entitled to an absolute and unconditional injunction.

Demurrer allowed.

SMART v. MOIR.

JULY 17, 1891.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Practice—Q. B. Act, sec. 36—Final judgment—Jurisdiction to amend—Mistake in law amendable—Discretion of Referee considered when not reviewed by Judge in Chambers.

Appeal by defendant from judgment of Bain, J., reported *ante* p. 38.

Cassidy for plaintiff.

Ewart, Q. C., and *Wilson* for defendant.

Held—

1. The court has jurisdiction after a final judgment has been signed, to set aside, or to amend it.

2. It cannot be held, in the face of *Cannan* v. *Reynolds* 5 E. & B. 30, that the court has no jurisdiction to set

aside a final judgment where there has been a mistake in signing it, even when the application is at the instance of the party by whom it was signed.

In the present case there was no doubt that the plaintiff's attorney intended to sign just such a judgment as was signed. The proceedings he took, in signing judgment, filing a replication, and giving notice of trial, showed that in what he did he was acting under a mistake.

Held—

1. The court could grant relief in such a case, which could not be distinguished from *Emery* v. *Webster* 9 Ex. 241, 10 Ex. 200, as far as the character and kind of mistake go; a mistake in law may be taken as sufficient to exercise such jurisdiction.

2. The Referee had jurisdiction to amend the judgment and it was in the interests of justice that he did so.

Morris v. *Armit*, unreported, cited and confirmed.

3. If the intention had been to abandon the portion not admitted, there should have been a *remittitur damna* in the roll, of which there is no pretence.

4. Even if satisfied that the attorney knew that the defendant disputed the right to proceed as was done, it would have been discretionary with the Referee to allow the plaintiff to rectify the error, and it was equally so for him to act upon the presumption of error afforded by the circumstances without requiring an affidavit. The discretion was exercised in favour of justice and honesty, and as its exercise was not disturbed by the learned Judge who heard the appeal, this court should certainly not interfere to nullify it.

Appeal dismissed with costs.

THE

WESTERN LAW TIMES.

NOTES OF RECENT DECISIONS.

MANITOBA.

BRYDON v. LUTES.

JULY 25, 1891.] [FULL COURT.—TAYLOR, C., J. KILLAM, J. BAIN, J.

Mechanic's lien—Non-completion of work according to contract—Rights of action.

Bill to enforce mechanic's lien. Appeal from verdict of Dubuc, J. A contract for the building of a house for $1,400 provided that the labour was "to be performed in the most workmanlike manner and in strict accordance with the full meaning of the plans and specifications to the satisfaction of the proprietor." At the trial the learned judge found that there were variations from the specifications which were no detriment to the building and were authorized by verbal instructions of the defendant, or waived, and that there was in other respects a substantial performance of the contract although there were some slight defects and variations for which an allowance of $40 should be made, and accordingly entered a verdict in favour of plaintiffs for full contract price, less $290 paid on account, and the above $40. The plaster of the house had

been injuriously affected by the frost, and damage to the above amount had resulted and the defendant was dissatisfied with the performanae of the work and refused to pay over the balance.

Ewart, Q. C., and *Phippen*, for defendant, appellant, chiefly relied upon the ground that the contract was not completed so as to entitle the plaintiff to recover the final payment.

Howell, Q. C., and *McMeans*, for plaintiff.

Held—

The defendant having clearly, as appears from the evidence, never accepted the work as complete, the plaintiffs, had they begun an action at law upon the agreement, must on the evidence have been non-suited on the ground that when they began their action they had not completed the work to the satisfaction of the defendant, *Andrews* v. *Belfield*, 2 C. B., N. S. 779, and they had no more right to file a bill to enforce the claim they have made than they had to bring an action. It is not a question whether the work was done substantially in accordance with the contract but whether it was done to the satisfaction of the defendant.

Per Killam, J.

"It appears to me to be absolutely against both principle and authority to admit the proposition that, where work is to be done in a specified manner and to be paid for upon completion, and it is done in a different manner or so defectively as to justify an allowance for defects, and where the party for whom it is done refuses to acquiesce in the variations or defects or accept the work, but simply takes the position that the workman must perform it according to the express stipulations and perfectly, and interposes no obstacle to this being done, the workman can recover before this is done." *Leake on Contracts* 68, approved of. *Addison on Contracts* 396, distinguished, as also *Hayward*

v. *Leonard*, 7 Pick 181. "Even if we were to adopt the principle laid down in *Hayward* v. *Leonard*, it does not appear to me that there can be said to have been 'an honest intention' within the meaning of that principle, to go by the contract, when there was such an obvious defect pointed out, for the evidence appears to show distinctly that the plaster was injured by frost, the plaintiffs were notified of it, and that reasonable enquiry should have convinced them of it."

Decree varied, lien allowed to stand only as to $110 balance due on $400, after allowing $290, already paid on work as it progressed, and bill declared prematurely filed as to the $1,000 residue.

No costs to either party up to decree. Costs of rehearing to defendant to be set off against $110, *pro tanto*, the party against whom balance may be found upon such setting off to pay the party in whose favour it may be found forthwith, after being certified to by the master.

RE R. L. ASHBAUGH, AN ATTORNEY.

JULY 25, 1891.] [FULL COURT—KILLAM, J. BAIN, J.

Attorney and Barrister—Striking off rolls—Criminal charge.

Appeal by attorney from judgment of the Chief Justice confirming Master's report and striking attorney off rolls, *ante* p. 68.

Howell, Q. C., and *Wade* for the Law Society.

Ashbaugh in person, for the appeal.

Judgment—

This is an application to reverse the judgment of the Chief Justice sitting in court, and the rule issued thereon directing that an attorney be struck from the roll of attorneys of this court.

The application was argued before the remaining members of the court. Mr. Justice Dubuc is now absent from

the Province, but, under the 22nd sec. of "The Court of Queen's Bench Act, 1885," my brother Bain and myself are enabled to dispose of it. I am, however, authorized by my brother Dubuc to state that he has read over the evidence and agrees in the decision which we are about to pronounce.

After a very careful perusal of the affidavits and depositions in this matter, I am of opinion that the decision of the Chief Justice must be affirmed. I think that it is unnecessary to repeat or to add much to the remarks made by the learned Chief Justice upon the evidence, with almost all of which I fully agree.

With all respect, I think it must be admitted that upon the point of the second affidavit of O'Connor being prepared without consultation the criticism of the attorney is correct, but the remark was not very material. A consideration of the depositions of O'Connor produces a strong impression that he felt the first affidavit to be correct, but desired to soften the matter for the attorney, and on his further examination by Mr. Hagel he evidently merely followed the cue suggested by the questions.

On the contrary, the theory of the attorney is that the prisoners' friends, authorized by them to effect a settlement and to pay or promise money for that purpose only, deliberately undertook voluntarily and upon their own responsibility that the accused would pay large sums not demanded. The sum which was paid to the attorney was enormous, having reference to the nature of the case, and in the absence of explanation we cannot feel that the attorney was entitled to such a sum from his client, or would have charged him any such amount for his services. Upon the evidence, it does not appear that the amount was based upon any definite estimate of the costs for which the client was really liable.

It is admitted also by the attorney, who claims the payments to be wholly gratuitous, that before the release

of the prisoners he prepared a memorandum of the amounts to be paid by the accused on the side of the prosecution, though the admission is probably intended to relate to the day of the dismissal of the charge; and he appears, also, about the same time to have renewed the assurance that the case would be dismissed. I merely add these remarks as suggesting circumstances that appear to me to strengthen greatly the case against the attorney.

I do not think that it is open to the Law Society, upon this application of the attorney, to ask that the motion to strike from the barristers' roll shall be considered.

The application should be dismissed with costs.

Per Bain J.—

After considering the evidence I find it impossible to come to any other conclusion than that the Chief Justice came to, that it is shewn that there was an arrangement, to which the attorney was a party, that the prosecution for the serious felony should be abandoned, and a change for a minor offence substituted, and that it was in pursuance of this arrangement that the $500 were paid to the attorney. The conduct of the attorney in the matter was highly unprofessional, and was a grave offence against the administration of justice, and I agree that the decision of the Chief Justice should be affirmed and this application dismissed with costs.

CASE MACHINE CO. v. LAIRD.

JULY 27, 1891.] [BAIN, J.

Parol evidence—Admissibility of in collateral agreements.

Demurrer to plaintiffs' replication.

Mulock, Q. C., for plaintiffs.

Howell, Q. C., for defendant.

The facts appear from the

Judgment—

The rule that parol testimony cannot be received to add to, vary or contradict a written instrument does not prevent parties to a written agreement, even if it be under seal, from proving that what is called a collateral agreement was made by parol in consideration that one of the parties would enter into the written agreement. The contention of the plaintiff is that the agreement alleged in the defendant's pleas and counterclaim is not a collateral agreement, but that it contradicts and varies, and so is inconsistent with, the deed alleged in the declaration, and that therefore the defendant cannot rely on it unless it be by deed.

The agreement under seal that the plaintiffs declare on is, that the defendant is to pay $915 on the delivery of the machine, or, in lieu of such payment, to pay $300 on delivery and to give his three notes for $200, $200 and $215, payable with interest in January, 1891, '92 and '93, respectively, and that "failing to pay said money or execute and deliver said notes, this order shall stand as his written obligation and have the same force and effect as his note for all sums not paid in cash." The agreement alleged by the defendant is, in effect, that, in consideration that the defendant would enter into the agreement declared on and would make the cash payment and would deliver the three notes, the plaintiffs would take from the defendants a second-hand separator at the price of $200, and would give the defendant credit for the price on the note for $200 falling due in January, 1891.

I am of opinion that this agreement is one that is distinct from and collateral to the agreement under seal, and that the defendant is at liberty to prove it, if he can, though it be not under seal. Such an agreement does not seem to be in any way inconsistent with the principal agreement; and it does not contradict or vary any of its terms. The defendant has to perform all the stipulations

of his contract with the plaintiffs exactly as the contract provides; he is to make the cash payment and give the notes, and pay the notes on the days appointed. But by a separate and distinct transaction the plaintiffs are to take this second-hand separator from the defendant and instead of paying him the price of it, they are to apply it toward the payment of the first of the $200 notes.

I think therefore, the demurrer to the plaintiffs replication should be allowed with costs.

KEEWATIN LUMBER CO. v. WISCH.

JULY 30, 1891.] [KILLAM, J.

Certificate of judgment—Exemptions—Pleading—Allegations in bill.

Bill to enforce certificate of judgment registered against defendant's lands. Bill taken *pro confesso* but at hearing

Cameron, for defendant, objected that the bill did not sufficiently show that the lands were not exempt from the lien, or the right to proceed thereon, the only allegation for that purpose being that the defendant "is not in occupation of the said described lands or any part thereof," and relied on *Fonseca* v. *McDonald*, 3 M. R. 415, where it was decided that "it is not all lands of a judgment debtor that are charged by the registration of a judgment, but only such lands as are not exempt from seizure under execution." The statutory provision applicable to above case is Ad. Jus. Act, 1885, sec. 11, . . . from the time of the recording of the same the said judgment shall bind and form a lien on all the estate and interest aforesaid in the lands of the judgment debtor . . . excepting always such real estate as is exempt from seizure under writs of execution . . . and . . . the judgment creditor may . . . proceed in equity upon the lien and charge thereby created.

Bradshaw for plaintiff.

Judgment,—

By the Act 49 V., c. 35, s. 14, the above section was amended so that the exception read "except that no proceedings in equity shall be taken on any such certificate of judgment against any real estate exempt," etc.; and by the Act 52 V., c. 36, s. 8, the last mentioned section was repealed and the original section amended by striking out the exception entirely; while the 10th section of the Act 52 V., c. 36, amended the 117th section of the Act 48 V., c. 17, which made certain personal and real estate free from seizure under execution, by striking out the word "real" in that connection, and inserting the words "and no proceedings in equity shall be taken against the following real estate under any certificate of judgment or attachment, namely," etc. The changes by this Act of 1889 were made in connection with the legislation which put an end to the issue of writs of execution against lands and confined creditors to the remedy by registration of their judgments and proceedings in equity thereon.

The contention for the plaintiff is that it is now unnecessary to negative the exemptions in such a bill.

The rule at common law is that where a pleader or an informant relies upon a statute he must negative any exception in the enacting clause on which his claim is based, but that a subsequent proviso in another section or even in a separate sentence of the same section need not be negatived, and any facts bringing the case within it may be left for the opposite party to set up. *Bac. Abr.* Statutes (L) 4; *Jones* v. *Anen*, 1 Ld. Raym 120; *Spieres* v. *Parker*, 1 T. R. 144; *Thibault* v. *Gibson*, 12 M. & W. 95; *Steel* v. *Smith*, 1 B. & A. 94.

The same rule, I think, is followed in equity, although I have not been referred to, and I have not found, any authority definitely settling it. It certainly is more con-

venient that in a case like the present it should be left for the defendant to claim the exemption and set up the facts entitling him to it. It was only because the form of the statute seemed positively to require it that I decided as I did in *Fonseca* v. *McDonald.*

I feel at liberty to treat the matter now as if the statute originally stood in the form in which it is now placed by the amendments. and I will make the usual decree to enforce the judgment for the plaintiff without considering whether the allegation referred to sufficiently negatived the exemptions.

PRACTICE.

MASSEY CO. v. HANNA.

JULY 30, 1891.] [KILLAM, J.

Practice—Prohibition—Grounds for—Costs of.

Plaintiffs issued writ in a county court. Defendant filed dispute note objecting to jurisdiction, and obtained rule for a prohibition. Before the filing of dispute note and the motion for rule, plaintiffs discovered their error and notified the clerk of county court not to proceed with the action, and on being served with the rule notified defendant that they did not intend to proceed and undertook to withdraw and pay costs of county court action.

On the return of the rule

Patterson, for the plaintiffs, submitted to the prohibition but argued that under such circumstances no costs should be allowed to the applicant.

Mulock, Q. C., in reply.

Held—

From the decisions in *Rex* vs. *Keating*, 1 Dowl 140; *Pewtress* vs. *Harvey*, 1 B. & Ad. 154; and *Ex parte the Overseers of Everton*, L. R. 10 C. P. 245, it appears that the statute 1 W. 4, c. 21, s. 1, providing that "the party in whose favour judgment shall be given" in prohibition "shall be entitled to the costs of attending the application and subsequent proceedings" does not apply when there are no pleadings in prohibition. See also *Wallace* v. *Allen*, L. R. 6 C. P. 245, and *Nerlick* v. *Clifford*, 6 P. R. 212, in the latter of which costs were refused where the question had not been raised in the lower court.

"It is clear upon the authorities cited in *Nerlick* v. *Clifford* that there is no absolute right to prohibition where the defect does not appear on the face of the proceedings and the party applies before he has an opportunity of raising the question in the court below. If the applicant had waited until the plaintiff had learned of the objection to the jurisdiction being taken he would have found that an application would be unnecessary.

I think that, in the absence of special circumstances, as to which I say nothing, the old practice should be followed when no cause is shown and the application is made without giving the court below an opportunity of deciding the point. Encouragement should not be given to parties to come to this court unnecessarily in reference to small claims which the county courts are established to deal with." *Brisebois* v. *Poudrier*, 1 M. R. 29; *Wright* v. *Arnold*, 6 M. R. 1; *Watson* v. *Lillico*, 6 M. R. 29; *Montreal* v. *Poyner*, 7 M. R. 270; *Mitchell* v. *Saver*, 20 Ont. 17; and *Field* v. *Rice*, 20 Ont. 309, considered.

Rule absolute without costs.

LYONS v. MANITOBA MILLING CO.

AUG. 20, 1891.] [IN CHAMBERS—KILLAM J.

Attachment—Jurisdiction of Referee to review order of County Judge for—Review of by Q. B. Judge.

Application to set aside writ of attachment, order therefor, and proceedings thereunder. A county court judge issued a writ of attachment on certain affidavits.

The defendants obtained a summons from Referee in Chambers to set aside the order and writ. After some enlargements and cross-examination of parties on affidavits in support of motion, objection was taken before the Referee that he had no jurisdiction to entertain the motion as being in the nature of an appeal from the county judge and on that ground the summons was dismissed. Application was then made to the learned judge who issued a summons in form both by way of appeal from the Referee and as upon a substautive original motion for the same purpose.

Ewart, Q. C., for plaintiff.

Culver, Q. C. and *Cameron*, for defendants.

Held—

1. "In so far as concerns the claim of defects in the original material, I think that the learned Referee was right in holding that the application was in the nature of an appeal from the county judge and thus excepted from his jurisdiction. With that exception, however, I am of opinion that the Referee can exercise the jurisdiction conferred by the 38th section of The Administration of Justice Act, 1885.

I think that under such circumstances, it would have been better for the Referee either to entertain or consider the motion upon the whole of the material or to adjourn it to come before a judge in Chambers. I do not mean to say that he should feel bound always to take such a course where a motion is thus made on similar double grounds,

for much must depend upon these being substantial grounds for an objection, or the degree of clearness of the applicant's right in respect of that part of the motion which the Referee could dispose of."

2. The county court judge having decided that certain alleged facts in the original affidavits formed a ground for the issue of the attachment and that they sufficiently convinced him of the defendants purpose, "I do not then feel at liberty to consider how far they would have convinced me, if the application had been made to me."

After a review of the evidence and examination, "I do, however, consider that these new circumstances so entirely weaken the original case made by the plaintiff that if they had been shown I do not conceive that an order for the attachment would have been made . . . I think, then, that not only has the plaintiffs' case been displaced, but that it has been shown affirmatively that there was not the intent to delay, defeat, or defraud the plaintiffs' or any creditors . . . I will not enter into the question whether it was shown that there was no cause of action justifying an attachment or whether or under what circumstances the order could be rescinded. I presume that the setting aside of the attachment will satisfy all reasonable puroses."

Attachment set aside with costs of motion before Referee and of appeal, including costs of all examinations with one exception.

THE

WESTERN LAW TIMES REPORTS.

EDITOR:
ARCHER MARTIN,
BARRISTER-AT-LAW.

MANITOBA.

MACARTHUR v. MURRAY.

JULY 20, 1891.] [IN CHAMBERS—BAIN, J.

Practice—Ex juris writ—Order allowing service.

Appeal from order of Referee allowing order to proceed.

Perdue, for plaintiff, respondent.
Patterson, for defendant, appellant.

The facts appear from the

Judgment—

The action is in respect of breaches of covenant which were made in Manitoba.

The writ of summons was personally served on the defendant, and the plaintiff has obtained an order to proceed under section 18 of the Common Law Procedure Act, which section fully covers or applies to the circumstances of the case. Under this section it is not necessary to obtain an order allowing the service, and the case being fully

provided for in the section, I do not think the effect of section 32 of the Administration of Justice Act of 1886 is to make it necessary for the plaintiff to obtain an order allowing the service before proceeding with the action. Section 32 is not so necessarily inconsistent with the provisions of the section of the Common Law Procedure Act as to work a repeal of any of the provisions of that section, or to make it essential that an order allowing the service shall be obtained before going on with the action in the manner directed by that section; and, as regards cases provided for in the Common Law Procedure Act the provisions of section 32 seem to be superfluous. In a former case, which arose under sub section E, of section 32, a case to which section 18 of the Common Law Procedure Act, did not apply at all, I held that it was necessary for the plaintiff to obtain an order allowing the service of the writ before he could proceed in the action, but there the plaintiff had nothing besides section 32 to rely on for this right to carry on his action.

The Referee has decided that the declaration sent to Mr. Patterson by Mr. Perdue was sent as a matter of courtesy and not with the intention of serving it, and I will not review his decision on this point.

Section 14 of the Queen's Bench Act 1886, expressly provides that when the plaintiff has obtained an order to proceed, he shall be at liberty to sign final judgment without proof of the claim, when it is for a liquidated demand and it is proved that at the time of the service of the writ the defendant had been served with a statement shewing fully the nature of the claim. This section also makes personal service of any other process than the writ of summons unnecessary.

The affidavit for the order to proceed is carelessly drawn in speaking of the action being brought for breaches of a covenant contained in a mortgage, while the action is

brought in respect of ten mortgages, but the affidavit shews that the covenants were entered into within the jurisdiction of this court, and the writ was part of the material on which the order was obtained, and there does not seem to be anything in the fourth ground in the summons. The affidavit also stated that the defendant resides at or near Stockport, and the order of the Referee that the copy of the declaration should be addressed to the defendant at Stockport has been complied with.

On the whole, and especially in the absence of any affidavit as to merits, I see no reason to reverse the order of the Referee, and I dismiss the summons with costs.

RADFORD v. DAVIDSON.

SEPTEMBER 3, 1891.] [KILLAM, J.

Real Prop. Act—Caveat—Summons to file Second Caveat—Costs.

The caveator lodged a caveat and filed a petition but did not serve same as in meantime he had sold property to present applicants who now asked that former caveat and petition be dismissed, and that they be allowed to file a new caveat and petition and begin proceedings anew.

Grimmett for applicants.

Campbell, Q. C., in reply for original caveatee.

Judgment—

I am not at all sure that any leave to file a new caveat is necessary, but in any event, I think that the course of the present applicants was not unreasonable, except that there has been some unnecessary delay since they received their conveyance. This however does not appear to have put the applicants for the certificate of title to any serious

disadvantage and may really have caused no delay in the ultimate disposition of their application.

I deem it best to make an order for the leave upon the terms of the present applicants paying any costs of and incidental to the former petition, and filing their new caveat and petition within ten days from this date.

THE

WESTERN LAW TIMES REPORTS.

EDITOR:
ARCHER MARTIN,
BARRISTER-AT-LAW.

MANITOBA.

RE JOHN HIGGINS' WILL.

OCTOBER 5, 1891.] [DUBUC, J.

Will—Construction of—Application by executors for advice of Court under 49 Vic., cap. 13—Power to entertain such.

Application of the executors and trustees of the will of the late John Higgins for the opinion and advice of the court under 49 Vic., chap. 13, sections 23-27.

The following questions were asked:

1. Should the executors recognize the claim of the widow for moneys expended for the past support and education of the children?

2. Should they further expend capital of the estate in making advances for the support and education of the children?

3. Should they sell certain properties of the testator for what they would at present realize?

4. May the property be mortgaged to raise money for the temporary uses of the estate?

5. May they expend any portion of the capital of the estate in paying an amount of $2000 per annum to the widow, and to what extent?

Perdue for the applicants.

Cameron for the infants.

Wade, for the widow, objected that the object of the enactment was to assist trustees in the execution of their trusts as to little matters of discretion, per Romilly, M. R., *Re Hooper*, 29 Beav. 656; the petition under the Act should relate only to the management and investment of trust property, *Re Lorenz's Settlement*, 1 Dr. and Sm. 401; therefore the court will not, on such a petition, construe an instrument or make any order affecting the rights of parties to property; where an important and difficult question is involved, the proper course is to bring an action instead of presenting a petition under the Act; *Walker on Executors*, 250; while no appeal lies from advice given under the statute the executors are exonerated from responsibility if the advice is followed; all the questions submitted are too important to be disposed of without the possibility of an appeal; even if all parties were agreeable to the questions being answered, this could not be done as infants were concerned.

Perdue in reply. The executors brought this application under the statute to save the expense to the estate which would be incurred by filing a bill; similar applications have been entertained by the court in other cases, *Re Brown*, 2 W. L. T., 66, and *Re Logan Trusts*, 3 M. R. 49, which last case went to appeal. The Manitoba Statute is wider than the English Act.

Cameron, for the infants, also asked that the application be entertained.

Wade in reply.—In cases cited it was not objected that application could not be answered under the statute. The act is no wider than the English act. Both include the words "management and administration." Although the Manitoba act empowers the judge to examine persons on oath and order production of documents, that has nothing to do with construing a will.

In reply to counsel for infants.—The questions asked cannot be answered even by consent when infants are concerned, *Re Mockett's Will*, John., 629.

Held—

That in the present case no object would be gained by answering the questions submitted, as the answers might not be binding upon the party objecting. The widow, Catharine Higgins, should not be precluded from an appeal where questions of importance are involved, as in the present application. A will cannot be construed under the statute.

Order made directing a bill to be filed for the purposes mentioned in the statement and, if deemed necessary, for the administration of the estate; costs of all parties to come out of the estate.

EMPIRE BREWING AND MALTING CO. (Ld.) v. CITY OF WINNIPEG.

OCTOBER 13, 1891.] [DUBUC, J.

Negligence—Repairing of streets—Liability of corporation for non-repair.

Action for damages to plaintiffs' horse caused by falling into hole in one of defendants' streets. County judge entered verdict in favour of defendants.

Cameron for plaintiff.

Isaac Campbell, Q. C., for defendants.

Judgment—

This is an appeal from the county court of the county of Selkirk, under the provisions of the statute passed at the last session of the Provincial Legislature, c. 2, section 21 and following.

The plaintiffs' horse was injured by getting into a hole or rut in Pembina street, Winnipeg, and three days afterwards an action was brought against the city for the value of the horse, and the county court judge, before whom the case was tried, rendered his judgment in favour of defendants. The plaintiffs appealed from his decision.

It is shown, by the evidence, that the street in question is a graded but unpaved street, on the south side of the Assiniboine river. The accident took place in September, 1890, during an unusually rainy period. The driver was going over that road with an empty beer wagon. He knew the place was bad, and he had passed there the previous day. When he had a load he used to go by Clarke St. instead of by Pembina St. The rut was caused by the passing of heavy wagons loaded with bricks, and by the plaintiffs vehicles carrying beer.

Two aldermen who were examined on behalf of the plaintiffs, said the street was in bad condition at the place where the accident occured. Alderman Mather says: "It would be a difficult matter to keep all the unpaved streets in Winnipeg constantly in repair so as to avoid ruts of this kind, or accidents of this kind." Alderman Ross swore as follows: "It was a wet fall. Don't think the road could have been kept in repair for teamsters during that season. Know of other streets with same kind of soil, that had constant work done on them, but could not be kept in order more than a day because of the wet."

The question is one of negligence. The corporation was aware of the bad condition of that street, but it was not shown that it knew of this particular hole or rut. The city is, no doubt, bound to keep the streets in a state of repair such as would afford to everyone a passable road to and from his place or to or from any place where he has business to transact. But with a very large number of unpaved streets, it is next to impossible, particularly in a wet season, with a heavy traffic going on, to have all the streets in a good, smooth and easy condition.

If the accident had occured to a stranger passing there for the first time, or if on this occasion the driver had no other road to reach the plaintiffs brewery, or again, if he had been unaware of the bad condition of this street, there might be some reason for saddling the city with the responsibility of the damage incurred. But the driver knew the place so well that he avoided it and went by Clarke street when he had a load on.

Under those circumstances and on the ground stated by the county court judge in his judgment, I think the appeal should be dismissed with costs.

MACARA v. DINES.

OCTOBER 13, 1891.] [DUBUC, J.

Jurisdiction of county court—Finding of county judge as to—Review of his decision in that respect.

Appeal to single judge of Queen's Bench from verdict entered by county judge of county of Selkirk in favor of plaintiff for $100.

Cumberland for plaintiff.

Howden and *Joseph J. Curran*, for defendant, contended at the trial that the contract was for $350 for rent, and

therefore in excess of the jurisdiction of the county court.

The county judge found that the rent was payable in two instalments, and only the one sued on was due when the suit commenced, and that his jurisdiction was well founded.

Held—

On the authority of *Bushell* v. *Moss*, 11 Prac. 252, and *Re Brown* v. *Cocking*, 3 L. R. Q. B. 672, the finding of the county judge should not be reviewed as to the question of his jurisdiction.

Appeal dismissed with costs.

PRACTICE.

RE THE MANITOBA MILLING AND BREWING CO. (LIMITED.)

OCTOBER 12, 1891.] [TAYLOR, C. J.

Winding up act—Grounds for making order—Execution in sheriff's hands—Disposal of property.

Petition for order under Winding-up act. The material filed showed certain facts and circumstances under which the applicant claimed to be entitled to the order.

Ewart, Q. C., and *Darby* for petitioner W. F. Henderson.

Howell, Q. C., for the company.

Tupper, Q. C., for Bank of British North America.

Hough for Blake, an execution creditor.

Judgment—

I do not think an order for the winding up of this company can be made upon the material now before me. There is no pretence for bringing the case under any of the provisions of the Winding-up Act, unless it can be brought under sub-section (*h*) of section 5. There is no evidence that the company has permitted any execution under which its property has been seized or levied upon to remain unsatisfied till within four days of the time fixed by the sheriff for the sale thereof. It is sworn that there is an execution in the sheriff's hands under which he has seized, and that by private sale he has disposed of some of the property seized, and that he is proceeding to make

further sales. There is no evidence that any time has been fixed for the sale, and under a purely statutory power, I do not see that I can act unless the case is brought strictly within the Act. I must refuse the application with costs.

ROSS v. VAN ETTEN.

OCTOBER 17, 1891.] [TAYLOR, C. J.

Examination of judgment debtor—Refusal to answer questions—Commitment for —"Satisfactory" questions.

Application to commit defendant, who had been examined as a judgment debtor, "for refusing to disclose his transactions respecting his property, and for not making satisfactory answers respecting the same, and for refusing to answer other questions hereunder written," or why he should not be ordered to attend at his own expense and "answer the said questions and such other questions arising out of the same as may be necessary, and to fully disclose his transactions respecting his property and the disposition thereof made by him."

To the summons were annexed six questions which the defendant refused to answer, but such refusal was not contumacious but solely on the advice of counsel who attended the examination on defendants' behalf.

Culver, Q.C., for plaintiff. The meaning which should be attached to the word "satisfactory" in Ad. Jus. Act, 1885, Sec. 52, s. s. 1, is that the answers to be satisfactory must show a satisfactory disposition of the property, *Crooks* v. *Strond*, 10 Prac. 131; the answers must be satisfactory not only in form, but in substance, *i. e.*, the account given of the property must show the transactions respecting the same to be satisfactory, and not merely full and truthful.

C. P. Wilson in reply.

Held—

After a consideration of the cases of *Lemon* v. *Lemon*, 6 Prac. 184; *Foster* v. *Van Wormer*, 12 Prac. 597; *Hobbs* v. *Scott*, 23 U. C. R. 619; *Dougall* v. *Yager*, 2 U. C. L. T. N. S. 161; *Graham* v. *Devlin*, 13 Prac. 245; *Re Nolen*, 6 T. R. 118; *Ex Parte Caulfield*, 5 Ir. Law Rep. 358; and *Re Courtney*, 11 Ir. Ch. R. 410, and looking at the whole examination, apart from the refusal to answer the six specific questions, it could not be said that the defendants answers were not satisfactory.

"As to the six specific questions which he refused to answer the reason given for the refusal is that the questions are asked to get evidence upon which to attack a judgment recovered against the defendant by the Western Lumber Co., or to discover what evidence the defendant would give in an action which the present plaintiffs have brought or threatened to bring against the sheriff. I do not think that it can be any ground for refusing to answer that the information gained by the examination will be of use or is intended to be used for the purposes of a suit against some third party. In many cases the answers given on such an examination are of use, as the foundation on which suits are brought, and intended to be brought, to set aside fraudulent conveyances, etc. The only point for consideration is, do the questions put relate to the debtors property or his transactions respecting the same? If they do the creditor is entitled to put them and have them answered.

The matter interrogated upon here is clearly one relating to the debtor's property and his transactions respecting the same. On the first of June, he, by bill of sale, sold to the Western Lumber Company his entire stock and business for the express consideration of $7,000. The Company seems to have gone into possession of the stock

and lumber yard. Then on the 20th of June this sale is cancelled and the Company sue and recover judgment. The debtor says that on the 1st of June he owed the lumber company $4,000, but three weeks after they sue and recover judgment against him for $6,278. The questions which he refused to answer relate to how the indebtedness came to be increased in the interval. He says he bought more lumber, and the questions are as to whether he was acting as the agent of the lumber company during the time, where the lumber was when bought, whether brought to the yard by the Company while they had possession of it, whether all bought at one time or not, when the last was bought? All these questions I have no doubt the debtor was bound to answer.

As the refusal appears not to have been contumacious, I do not order the debtor to be committed, but order him to attend at his own expense and answer the questions set out in the summons, and such other questions as may necessarily arise out of the answers given to these.

The order must go with costs of this application and any increased costs of the examination occasioned by the refusal to answer."

THE

WESTERN LAW TIMES REPORTS.

EDITOR:
ARCHER MARTIN,
BARRISTER-AT-LAW.

MANITOBA.

IN THE QUEEN'S BENCH.

MACHRAY v. HIGGINS.

OCTOBER 23, 1891.] [BAIN J.

Will—Construction of—Widow's annuity payable out of income or corpus—Advances for maintenance and education—Power to mortgage estate.

Bill filed by executors and trustees of John Higgins (deceased) for the construction of his will as set out in prior report of the application by the trustees for the opinion and advice of the court, *ante* pages 95-6-7, where an order was made directing a bill to be filed for the determination of said questions.

Perdue for the plaintiff.

Cameron for the infants.

Wade for the widow.

At the hearing the learned judge found in answer to certain of these questions that it was the income only of

the estate that was to be paid to the widow and that the *corpus* should remain intact to be disposed of as the will directed; that the expenditure by the widow for the past support and education of the children could not be recognized as a claim by the executors; though, in the future, advances would have to be made out of the childrens' shares for their support and education; there was no evidence of any intention on the part of the testator that a conversion might be effected otherwise than by an absolute sale, consequently no power of mortgaging vested in the trustees.

[An appeal is being taken on behalf of the widow from this finding, so it is not deemed expedient to give a more detailed report at the present time.—ED.]

RE LAKE WINNIPEG TRANS. LUMBER & TRADING CO. (LTD.)
PAULSON'S CLAIM.

NOVEMBER 7, 1891.] [TAYLOR, C. J.

Winding Up Act—Claim for wages against directors of company—Leave to bring action against company.

Application for leave to bring action for wages against a company while the same was in process of being wound up under Winding Up Act.

Wade for claimant.

Mathers for liquidator of company.

Judgment—

This is a claim for alleged arrears of wages due the claimant. It has been admitted by the Liquidator at the full amount claimed, and, so far it has not been disputed by any of the other creditors or by any of the contributories.

Under sec. 56, sub sec. 2 of the Winding Up Act, clerks and other persons in, or having been in, the employment of the company in or about its business or trade, shall be

collocated in the dividend sheet by special privilege over other creditors for any arrears of salary or wages due and unpaid to them at the time of the making of the winding up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order. But this company is one incorporated under the Manitoba Joint Stock Companies Incorporation Act, and section 276 of that act provides that the directors of the company shall be jointly and severally liable to the labourers, servants and apprentices thereof, for all debts not exceeding one year's wages due for services performed for the company whilst they are such directors respectively; but no director is to be liable in an action therefor unless the company has been sued therefor within one year after the debt became due, nor unless such director is sued within one year from the time within which he ceased to be such director, nor before an execution against the company has been returned and satisfied in whole or in part.

The claimant now asks leave to bring an action against the company so that, if the execution or any judgment against the company is returned unsatisfied he may proceed to sue the directors.

Section 17 of the Winding Up Act provides that every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding up order shall be void. But by section 16 it is provided that when the winding up order is made, no suit, action or other proceeding shall be proceeded with, or commenced against the company except with the leave of the court, and subject to such terms as the court imposes.

These sections must be read together, and it has been held on the corresponding sections in the English Act that sec. 17 must be held as only avoiding attachments, sequestrations, distresses or executions when leave to put them

in force has not been given under section 16. *Re Exhall Coal Mining Co.*, 4 D. J. & S. 377; *Ex parte Carnelley*, 35 Ch. D. 656. So in *Universal Disinfector Co.*, L. R. 20 Eq. 162, Sir Geo. Jessel, M. R., said it appeared quite possible to read the two sections together without any inconsistency. He said further, "There are many suits to which a company is a necessary party in which you do not want to enforce any rights against the company. You want to ascertain your rights and enforce them against others."

That is the claimant's position here. He does not want to enforce any rights against the company, but he desires to ascertain his rights against it, in order that he may then proceed to enforce them against others. As there is, under sec. 276, a time limited within which this action must be brought against the company, otherwise his remedy against the individual directors of the company is gone, I think leave should be given the claimant to proceed with his action against the company. My giving such leave does not, of course, preclude the raising of any defence by the directors, should they be sued, which may be open to them.

HADDOCK v. RUSSELL.

NOVEMBER 10, 1891.] [KILLAM, J.

County Court Act—Appeal from verdict in replevin—Jurisdiction of Queen's Bench.

Action of replevin. Jury found for defendants. On motion the county court judge set aside the verdict of the jury and entered a verdict in favour of the plaintiffs. The defendants appealed.

Andrews, for the plaintiff, took objection to the appeal on the ground that the court had no jurisdiction to hear the same, as by substituted section 243 of the County Courts Act, there can only be an appeal where the amount in question is twenty dollars or more, and here it is not a

question of any amount of money, but that of title to goods; citing *Turner* v. *Imperial Bank*, 9 Prac. 22; *Sinclair's Div. Ct. Act* of 1880, 42, *O'Brien's Appendix*, 18; *Statten* v. *Findlay*, 1 Can. L. T., 66.

Haggart in reply.

Held—

The objection was well taken.

Appeal struck out with costs.

PRACTICE.

PION v. ROMIEUX.

OCTOBER 26, 1891.] [IN CHAMBERS—KILLAM J.

Costs—Review of taxation of—Effect of succeeding on certain issues when postea is on whole record.

Summons to review Master's taxation.

Huggard for summons, for defendant.

Munson in reply.

Judgment—

This is an application to review taxation of plaintiff's costs after verdict for plaintiff.

The defendants claim that they succeeded upon certain issues and are entitled to the costs thereof. The only verdict entered is for the plaintiff for $130. I reserved my decision in order to consider how far I could go behind this and examine whether the principle upon which the amount was made up involved a finding for the defendant upon certain issues. After much research I am unable to find any authority for doing so. The only recorded verdict

is one for the plaintiff and the *postea* is for the plaintiff upon the whole record. It seems to me then to be impossible to go behind this, and that the defendants' only remedy, if they be correct in claiming they succeeded on any issues, would be to apply to the judge who tried the cause to alter the *postea* so that there may be a record of some issue found for them as to amount or a particular plea.

I am also unable to say that the Master was wrong, as the defendants claim, in finding that the plaintiff was justified in summoning certain witnesses.

There is also a question as to the right to the costs of drawing and entering the record. The defendants gave notice of trial and entered record, but the plaintiff also drew and entered a record on which the verdict and *postea* are entered.

I think that the plaintiff was not entitled to enter a record and that a defendant giving notice of trial may neglect entering a record and thus prevent trial upon his notice. But in the present instance as the plaintiff did enter a record which was used for the trial of the cause and on which verdict was entered, it is too late to say that it was not a proper step and the costs must be allowed.

Summons discharged with costs.

RE BERGMAN.

OCTOBER 30, 1891.] [TAYLOR, C. J.

Maritime lien—Winding Up Act—Reservation of fund to satisfy such lien—Right to proceed in Exchequer Court in Admiralty.

Jonas Bergman, master of the ship *Aurora*, the property of the Lake Winnipeg Transportation Lumber & Trading Company, (Ld.) had proved against the Company, under winding up proceedings, for $505.59, balance of wages due as such master.

He now sought to enforce a maritime lien against the vessel for the amount of his wages.

This was an application for a direction that the official liquidator of the company should, after receipt by him of a sufficient sum out of the first moneys coming to his hands, pay into court such sum as the judge might direct to a particular account, to answer such demand for wages as master of the vessel, with interest, and for leave to the applicant to increase the amount in case it should be insufficient to satisfy his demand; or that notwithstanding the winding up order the applicant might have liberty to commence and proceed with an action *in rem* against the owners and parties interested in the *Aurora* in the Exchequer Court of Canada, in Admiralty.

Wade, for applicant, cited *In re Rio Grande*, 5 Ch. D. 282; *In re David Lloyd & Co.*, 6 Ch. D. 339; *Blakeley* v. *Dent*, 15 W. R. 663; *Wells* v. *Estates Investment Co.*, 15 W. R. 762; *In re Australian Direct Steam Navigation Co.*, L. R. 20 Eq. 325.

Mathers contra.

Held—

That the official liquidator should pay into court out of the first moneys coming to his hands from the proceeds of the sale of the ship *Aurora* the sum of $600 to a particular account to answer the demand of the applicant, and interest thereon and costs, if he shall be found to be entitled to a maritime lien therefor, such payment to be without prejudice to any application of the applicant to increase the amount in case it should be found insufficient to satisfy his demand, with liberty to the applicant to apply for leave to enforce his demand by action in the Exchequer Court of Canada in Admiralty, or by such other proceeding as he might be advised.

Costs of this application reserved until matter finally disposed of.

ROSS v. MORGAN.

OCTOBER 31, 1891.] [KILLAM J.

Real Property Act—Petition of caveator—Security for costs of caveatee.

Application by caveatee for security for costs.

Crawford for petitioner, caveator.

Monkman for caveatee.

The facts appear from the

Judgment—

This is a petition by a caveator under the Real Property Act. The petitioner resides out of the jurisdiction and the caveatee on being served with appointment for hearing of petition applied for security for costs and a summons was granted returnable with the petition. The question is whether security should be ordered.

The rule in equity is that when a party resident out of the jurisdiction applies for an order which by any statute may be granted on a summary application or petition, the applicant is required to give security for costs if the opposite party ask it. *Ex parte Siedler*, 12 Sm. 91.

This application for security may be made when the petition comes up for hearing or before. *Atkins v. Cooke*, 3 Drew 694.

I think that this practice must be applied under the 127th section of the Real Property Act of 1889, and that an order should be made staying the proceedings until security be given.

This is an entirely different question from that usually raised when an order is made for trial of an issue to determine questions raised upon such a petition. If a party shows cause to the petition without asking the security he waives the right to it in respect of the motion, but this may not be held a waiver of the right in respect of any such issue. This point may deserve some further consideration. Costs of the motion will be part of the costs of the

petition and abide the event of any order as to such costs.

In the present case the order is only for security for costs of the petition and the hearing and disposition thereof, the amount to be determined by the prothonotary.

HAY v. NIXON.

NOVEMBER 7, 1891.] [TAYLOR, C. J.

Real Property Act—Petition—Person to whom certificate is directed to issue made a party—Plaintiff in such case.

Petition under Real Property Act. In the application for certificate the applicant, Nixon, directed the certificate to issue to one Whyte. Counsel for caveator argued that he was entitled to have Whyte added as a party.

C. P. Wilson for caveator Hay, the petitioner.

E. L. Taylor (Aikins, Culver, Patterson & McCleneghan) for caveatee, and Whyte.

Judgment—

Nixon made an application to have a parcel of land brought under the provisions of the Real Property Act and for a certificate of title. In consequence of that application, notice was served upon Hay, who thereupon filed a caveat which he followed up with the petition now before me. The case is one in which an issue should be directed. There seems no dispute upon that, nor that the caveatee should be plaintiff in the issue.

But Nixon's application to bring the land under the Real Property Act directed the certificate of title for the land to be issued in the name of William Whyte. Such a case is provided for by sec. 45 of the Real Property Act of 1889, and that provides that such a direction "shall from the time of its filing with the District Registrar, have the effect of conveying and transferring to such person as regards such land all the estate or interest, whether legal or equitable, which the applicant is applying to have

registered under the new system as fully and effectually as if such estate were transferred by deed." The question then is raised, who should be plaintiff in the issue, Nixon or Whyte? Or, should Whyte be added as a party, and they both be plaintiffs? Clearly Whyte must be a party, for if the direction given by Nixon is in proper form and regular, it, as soon as filed, transferred all Nixon's interest therein, and he alone is now entitled to the land. But Nixon is the person who set the proceedings in motion. It was in consequence of the application filed by him and of the notice served at his instance upon Hay that the latter filed the caveat, followed it up with the present petition and incurred the costs he has up to the present time. It would seem therefore that Hay is entitled to have him retained as a party so that he may have the benefit of any remedy against him for costs, should the issue be decided in favour of the caveator.

The order should therefore be adding Whyte as a plaintiff and directing an issue to try whether he is entitled, etc., as against Hay, and reserving in the usual way the question of costs and all other matters.

EXCHEQUER COURT OF CANADA.*

REGINA v. BARRY.

SEPTEMBER 17, 1891.] [BURBIDGE, J.

Injurious affection of land—Construction of a railway siding on a side walk contiguous thereto—Measure of damages.

Held—

Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under The Government Railways Act, 1881, unless the injury (1) is occasioned by an act made lawful by the statutory powers exercised, (2) is such an injury as would have sustained an action but for such statutory powers, and (3) is an injury to lands or some right or interest therein, and not a personal injury, or an injury to trade.

The construction of a railway siding along the side walk contiguous to land whereby access to such lands is interfered with, and the frontage of the property destroyed for the uses for which it is held (in this case for sale in building lots) is such an injury thereto as will entitle the owner to compensation.

Qnere: Whether the rule that compensation in cases of injurious affection only must be confined to such damages as arise from the construction of the authorized works, and must not be extended to those resulting from the user of such works, is applicable to cases arising under The Government Railways Act, 1881?

*We are indebted to L. A. Audette, Esq., registrar of this court, for the following advance notes of cases.

REGINA v. MALCOLM.

SEPTEMBER 17, 1891.] [BURBIDGE J.

Injurious affection of property by construction of public work—Obstruction of access—Right to compensation—Waiver.

The defendant was the owner of a dwelling house and property fronting on a public highway. In the construction of a Government railway, the Crown erected a bridge or over-head crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had thereto freely enjoyed.

Held—

That the defendant was entitled to compensation under The Government Railways Act and The Expropriation Acts. *Beckett v. The Midland Railway Company*, L. R. 3 C. P. 82, referred to.

The defendant, and a number of other persons interested in the manner in which the crossing was to be made, met the Chief Engineer of Government Railways and talked over the matter with him. The defendant, who does not appear to have taken any active part in the discussion, and the other persons mentioned, wished to have a crossing at rail level with gates; but the Chief Engineer declining to authorize such gates, it was decided that there should be an over-head crossing with a grade of one in twenty. Subsequently the defendant signed a petition to have the grades increased to one in twelve, as the interference with access to his property would in that way be lessened. The prayer in the petition was not granted.

Held—

That by his presence at such meeting the defendant did not waive his right to compensation.

REGINA v. FISHER.

SEPTEMBER 21, 1891.] [BURBIDGE, J.

Interference with public right of navigation—Injunction to restrain—Jurisdiction of Exchequer Court—Right to authorize such interference since the union of the Provinces—Position of Provincial Legislatures with respect thereto—Right of Federal authorities to exercise powers created prior to the union.

Held—

1. An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbour is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vic. c. 16, s. 17 (Can.)

2. A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament.

3. The provincial legislatures, since the union of the provinces, cannot authorize such an interference.

4. Wherever by act of the provincial legislature passed before the union authority is given to the Crown to permit an interference with the public right of navigation, such authority is exercisable by the Governor-General-in-Council and not by the Lieutenant-Governors of the provinces.

ARCHIBALD v. REGINAM.

SEPTEMBER 21, 1891.] [BURBIDGE, J.

Contract—Construction—Implied promise—Breach thereof.

The suppliant had a contract to carry Her Majesty's mails along a certain route. In the construction of a Government railway the Crown obstructed a highway used by the suppliant in the carriage of such mails, and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed

by both parties, the suppliant sought to maintain an action by petition of right for breach thereof, on the ground that there was an implied undertaking on the part of the Crown in making such contract that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been.

Held—

That such an undertaking could not be read into the contract by implication

DUBE v. REGINAM.

OCTOBER 14, 1891.] [BURBIDGE, J.

Petition of right—Injury received on government railway—Negligence—Orde for particulars—Practice.

Where in his petition the suppliant alleged in general terms that the injuries he had received in an accident on a Government Railway in the Province of Quebec, resulted from the negligence of the servants of the Crown in charge of the train, and from defects in the construction of the railway, an order was made for the delivering to the respondent of particulars of such negligence and defects.

IN THE SUPREME COURT OF CANADA.

BARRETT v. CITY OF WINNIPEG.

OCTOBER 28, 1891.] { SIR W. J. RITCHIE, C.J. STRONG, J. FOURNIER, J. PATTERSON J. TASCHEREAU, J.

Constitutional law—B. N. A. Act—The Manitoba Act—Separate Schools in Manitoba—Right of Roman Catholics thereto—Assessment for school purposes by City of Winnipeg—Quashing by-laws of—Manitoba Public Schools Act 1890 ultra vires.

The Manitoba Schools Act of 1890 is *ultra vires* of the Legislature of that Province.

The words "or practice" in sub-sec. (1) of sec. xxii of The Manitoba Act, which provides that "nothing" in the laws of the Legislature of that Province relating to education "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union," save and reserve to the Roman Catholics of that Province the privilege of the denominational division of their schools from the Protestant schools, and they cannot be taxed for the support of Protestant schools.

Appeal from the judgment of the Court of Queen's Bench for Manitoba.

The British North America Act, 1867, sec. 93, provided that in each Province the Legislature

may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union. . . . . .

The Manitoba Act, 33 Vic., cap. 3, providing for the formation of that Province, contained the following clause:

XXII. In and for the Province, the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law or practice in the Province at the union:

(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

By the "Act respecting the Public Schools" and the "Act respecting the Department of Education," both assented to on March 31, 1890, the Legislature of Manitoba purported to abolish the system of Separate Schools for Protestants and Roman Catholics, which at that time was in existence in said Province, and established instead a system under which the public schools were organized in all the school districts without regard to the religious views of the ratepayers.

The City of Winnipeg on July 14, 1890, passed a by-law, No. 480, to authorize an assessment for city and school purposes in that city for the current municipal year. On July 28 another by-law, No. 483, was passed amending the former by-law.

On October 7, 1890, one John Kelly Barrett, a Roman Catholic ratepayer of said city, obtained, under Munic. Act, 53 V., c. 51, s. 258, a summons for an order to quash said by-laws "for illegality, and that upon the following among other grounds:

1. That because by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum."

No other ground was stated.

On November 24, 1890, the Hon. Mr. Justice Killam delivered judgment in the matter and made an order dismissing the summons with costs.—Vol. 1, p. 157.

The applicant appealed to the Full Court of Queen's Bench for Manitoba from the judgment of Killam, J. and on February 2, 1891, the last mentioned Court, (Taylor, C. J., Dubuc and Bain J J.,) gave judgment dismissing the

appeal with costs, Dubuc, J., dissenting.—Vol. 1, p. 195. The plaintiff thereupon appealed to this Honourable Court.*

S. H. Blake, Q.C., *Ewart*, Q.C. and *Brophy* for plaintiff, appellant.

Joseph Martin, late Attorney-General of Manitoba, and *Gormully*, Q.C., for defendants, respondents.

Judgment—†

SIR W. J. RITCHIE, C. J.—This is an application to quash two by-laws of the municipal corporation of the city of Winnipeg which were passed for levying a rate for municipal and school purposes in that city for the year 1890, and they assess all real and personal property in the city for such purpose. It is asked that these by-laws be quashed for illegality on the following, among other, grounds: That, because by the said by-laws the amounts to be levied for school purposes for the Protestant and Roman Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum.

It must be assumed that in legislating with reference to a constitution for Manitoba the Dominion Parliament was well acquainted with the conditions of the country to which it was about to give a constitution, and it must have known full well that at that time there were no schools established by law, religious or secular, public or sectarian. In such a state of affairs, and having reference to the condition of the population and the deep interest felt, and strong opinions entertained, on the subject of separate schools, it cannot be supposed that the legislature had not its attention more particularly directed to the educational institutions of Manitoba, and more especially

*Owing to counsel residing far apart, and lack of time before going to press we are unable to obtain the arguments of these gentlemen.

†We are indebted to the editor of the *Free Press* for the loan of copies of these judgments forwarded from Ottawa.

to the schools then in practical operation, their constitution, mode of support, and their peculiar character in matters of religious instruction in Manitoba. To have overlooked considerations of this kind is to impute to parliament a degree of short-sightedness and indifference which in view of the discussions relating to separate schools which had taken place in the older provinces or some of them, and to the extreme vigilance with which educational questions are scanned, and the importance attached to them, more particularly by the Catholic church as testified to by Monsg. Taché cannot, to my mind, be for a moment entertained. Read in the light of considerations such as these, must we not conclude that the Legislature well weighed its language, and intended that every word it used should have force and effect?

The British North America Act confers on the local legislature the exclusive power to make laws in relation to education, provided that nothing in such laws shall prejudicially affect any rights or privilege with respect to denominational schools which any class of persons *had by law in the province at the union*, but the Manitoba Act goes much further, and declares that nothing in such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had *by law or practice* in the province at the union. We are now practically asked to reject the words "or practice" and construe the statute as if they had not been used, and to read this restrictive clause out of the statute as being inapplicable to the existing state of things in Manitoba at the union, whereas, on the contrary, I think by the insertion of the words "or practice" it was made practically applicable to the condition at that time of the educational institutions which were unquestionably and solely, as the evidence shows, of a denominational character. It is clear that at the time of the passing of the Manitoba Act no class of persons had

by law any rights or privileges secured to them, so if we reject the words "or practice" as meaningless or inoperative, we shall be practically expunging the whole of the restrictive clause from the statute. I know of no rule of construction to justify such a proceeding unless the clause is wholly unintelligible or incapable of any reasonable construction.

The words used, in my opinion, are of no doubtful import, but are, on the contrary, plain, certain and unambiguous and must be read in their ordinary grammatical sense. Effect should be given to all the words of a statute, nothing adding thereto, nothing diminishing therefrom, as was said by Tindal, C. J., in *Everett* v. *Wells*, 2 Scott N. S. 531. The legislature must be understood to mean what it has plainly expressed, and this excludes construction. See *Reg.* v. *Banbury*, 1 A. & E. 142. It is a settled canon of construction that no clause, sentence or word shall be construed superfluous, void or insignificant if it can be prevented. See *Reg.* v. *The Bishop of Oxford*, 4 Q. B. D. 261.

While it is quite clear that, at the time of the passing of this act, there were no denominational or other schools established and recognized by law, it is equally clear that there was at that time in actual operation or practice, a system of denominational schools in Manitoba, well established, and the *de facto* rights and privileges of which were enjoyed by a large class of persons. What then, was there more reasonable than that the legislature should protect and preserve to such class of persons those rights and privileges they enjoyed in practice though not theretofore secured to them by law, but which the Dominion parliament appears to have deemed it just should not, after the coming into operation of the new provincial constitution, be prejudicially affected by the action of the local legislature?

I quite agree with the cases cited by the learned Chief Justice of Manitoba as to the rules by which the act should be construed. I agree that the court must look, not only at the words of the statutes, but at the cause of making it to ascertain the intent. When we find the Parliament of Canada altering and adding to the language of the British North America Act by inserting a limitation not in the British North America Act, must we not conclude that it was done advisedly? What absurdity, inconsistency, injustice or contradiction is there in giving the words "or practice" a literal construction, more especially, as I have endeavoured to show, as the literal meaning is the only meaning the words are capable of, and is entirely consistent with the manifest intention of the legislature, namely, to meet the exigencies of the country and cover denominational schools of the class practically in use and operation? If the literal meaning is not to prevail I have yet to hear what other meaning is to be attached to the words "or practice." If the legislature intended to protect the classes of persons who had founded and were carrying on denominational schools of the character of those which existed at the time of the passiug of the act.I am at a loss to know what other words they could more aptly have used. They might, it is true, have said "which any class of persons has by law or usage" but the words "practice" and "usage" are synonymous. I agree, also, that we should ascertain what the language of the legislature means; in other words, to suppose that Parliament meant what Parliament has clearly said.

It cannot be said that the words used do not harmonize with the subject of the enactment and the object which I think the legislature had in view, but if the legislature intended to recognize denominational schools how could they have used more expressive words to indicate their intention, since the words used, read in their ordinary grammatical

sense, admit of but one meaning aud therefore one construction and I do not think we should speculate on the intention of the legislature, more particularly as the intention is very clearly indicated by the language used, considering the condition of the country and the state of education in that country,and the object appearing from these circumstances that the legislature must have had in view in using them, which, in my opinion, was clearly to protect the rights and privileges with respect to denominational schools which any class of persons had by law *or practice*, that is to say, had by usage, at the time of the union. I cannot read the language of the act in any other sense.

The decision of the court in the case of *Ex parte Renaud*, 1 Pugs. 273, turned entirely on the fact that the Parish School act of New Brunswick, 21 Vic. cap. 9, conferred no legal rights on any class of persons with respect to denominational schools. It was, then, simply that there was no legal right with respect to denominational schools, a very different case from that we are now called on to determine. It may very well be that, in view of the wording of the British North America act, and the peculiar state of educational matters in Manitoba, the Dominion parliament determined to enlarge the scope of the British North America act and protect, not only denominational schools established by law but those existing in practice, for, as I am reported to have said, and, no doubt, did say in *Ex parte Renaud*, that in that case "we must look to the law as it was at the time of the union, and by that, and that alone, be governed;" now, on the other hand, in this case we must look to the practice with reference to denominational schools as it existed at the time of the passing of the Manitoba act.

That this was the view taken by the Legislature of Manitoba would seem to be indicated by the legislation of that province up to the passing of the Public Schools act

which very clearly recognized denominational schools and made provision for their maintenance and support, providing that support for Protestant schools should be taxed on Protestants and for Catholic schools should be taxed on Catholics, and conferring the management and control of Protestant schools on Protestants and the like management and control of Catholic schools on Catholics. This denominational system was most effectually wiped out by the Public Schools Act, and not a vestige of the denominational character left in the school system of Manitoba. Mr. Justice Dubuc gives an accurate synopsis of the legislation as follows:

"The provisions of law in regard to schools, made applicable to Manitoba at the union, were the 93rd section of the British North America act, and the 22nd section of the Manitoba act.

Under the said provisions of our constitution, the provincial legislature, at its first session, in 1871, passed an 'Act to establish a system of education in this Province.' By the said act, the Lieutenant-Governor-in-Council was empowered to appoint not less than ten, or more than fourteen persons, to be a Board of Education for the Province, of whom one-half were to be Protestants, and the other half Catholics; also one superintendent of Protestant schools and one superintendent of Catholic schools, who were joint secretaries of the Board.

The duties of the Board were described as follows: '1st. To make from time to time such regulations as they may think fit for the general organization of the common schools. 2nd. To select books and maps and globes to be used in the common schools, due regard being had in such selection to the choice of English books, maps and globes for the English schools, and French for the French schools, but the authority hereby given is not to extend to the selection of books having reference to the religion or morals, the

selection of such being regulated by a subsequent clause of this act. 3rd. To alter and subdivide, with the sanction of the Lieutenant-Governor-in-Council, any school district established by this act.'

The general board was divided into two sections, and among the duties of each section we find the following: 'Each section shall have under its control and management the discipline of the schools of the section; it shall make rules and regulations for the examination, grading, and licensing of teachers, and for the withdrawal of licenses on sufficient cause; it shall prescribe such of the books to be used in the schools of the section as have reference to religion or morals.'

By section 13, the monies appropriated to education by the legislature were to be divided equally, one moiety thereof to the support of Protestant schools, the other moiety to the support of Catholic schools.

The first board appointed by the Lieutenant-Governor-in-Council, was composed of the Bishop of St. Boniface, the Bishop of Rupert's Land, several Catholic priests, several Protestant clergymen of various denominations, and a couple of laymen for each section. The said statute was amended from time to time, as the country was becoming more settled, and new exigencies arose. But the same system prevailed until the act of last session; the only substantial amendments were that, in 1875, the board was increased to 21, 12 Protestants and 9 Roman Catholics, and the monies voted by the legislature were to be divided between Protestants and Catholics in proportion to the number of children of school age in the respective Protestant and Catholic districts.

The more noticeable change in the system was that the denominational distinction between the Catholics and Protestants, and the independent working of the two sections, became more and more pronounced under the different

statutes afterwards passed. Section 27, of the act of 1875, c. 27, says that the establishment of a school district of one denomination shall not prevent the establishment of a school district of the other denomination in the same place.

The same principle is carried out and somewhat extended by sections 39, 40 and 41 of the act of 1876, c. 1.

In 1887, by c. 12, s. 10, it was enacted that in 'no case a Protestant ratepayer shall be obliged to pay for a Catholic school, and a Catholic ratepayer for a Protestant school.'

So it is manifest that, until the act of last session, the school system created by the Provincial legislature, under the provisions of the constitutional act, was entirely based and carried on, on the denominational principle, as divided between Protestant and Roman Catholic schools."

The only question, it strikes me, we are now called upon to consider is: Does this public school act prejudicially affect the class of persons who enjoyed the rights and privileges of denominational schools at the time of the union? Now what were the provisions of the Public Schools act? Mr. Justice Dubuc likewise gives a synopsis of the Public Schools act as follows:

"At the last session of the legislature, two acts were passed in respect of education, the first one, c. 37, abolishes the Board of Education heretofore existing, and the office of Superintendent of Education, and creates a department of education which is to consist of the executive council or a committee thereof, appointed by the Lieutenant-Governor-in-Council, and also an advisory board consisting of seven members, four of whom are to be appointed by the department of education, two by the the teachers of the province, and one by the University Council. Among the duties of the advisory board is the power 'to examine and authorize text books and books of reference for the use of the pupils and school libraries; to determine the qualification of teachers and inspectors for high and public schools; to

appoint examiners for the purpose of preparing examination papers; to prescribe the form of religious exercises to be used in schools.'

The next act is the Public Schools Act, c. 38. It repeals all former statutes relating to education. It enacts amongst other things as follows: Section 3. 'All Protestant and Catholic school districts, together with all elections and appointments to office, all agreements, contracts, assessments and rate bills, heretofore duly made in relation to to Protestant or Catholic schools, and existing when this act comes into force, shall be subject to the provisions of this act.' Section 4. 'The term for which each school trustee holds office at the time this act takes effect shall continue as if such term had been created by virtue of an election under this act.' Section 5. 'All public schools shall be free schools, and every person in rural municipalities between the age of six and sixteen shall have the right to attend such school.' Section 6. 'Religious exercises in the public schools shall be conducted according to the regulations of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place.' Section 7, 'Religious exercises shall be held in a puplic school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees, it shall be the duty of the teacher to hold such religious exercises.' Section 8, 'The public schools shall be entirely nonsectarian, and no religious exercises shall be allowed therein except as above provided.'

It provides for the formation, alteration, and union of school districts in rural municipalities, and in cities, towns or villages, the election of school trustees, and for levying

a rate on the taxable property in each school district for such school purposes.

Section 92 enacts that 'The municipal council of every city, town and village shall levy and collect upon the taxable property within the municipality in the manner provided in this act and in the Municipal and Assessment acts, such sum as may be required by the public school trustees for school purposes.'

Section 108, which provides for the legislative grant to schools, has the following sub-section: '(3) Any school not conducted according to all the provisions of this, or any act in force for time being, or the regulations of the Department of Education, or the advisory board, shall not be deemed a public school within the meaning of the law, and shall not participate in the legislative grant.' By section 143: 'No teacher shall use or permit to be used as text books, any books in a model or public school, except such as are authorized by the advisory board, and no portion of the legislative grant shall be paid to any school in which unauthorized books are used.' By section 179: 'In cases where, before the coming into force of this act, Catholic school districts have been established as in the next preceding section mentioned (that is, covering the same territory as any Protestant district), such Catholic school district shall, upon the coming into force of this act, cease to exist, and all the assets of such Catholic school district shall belong to, and all the liabilities thereof be paid by the public school district.' It is easy to see from the above that the new act makes a complete change in the system. The denominational division of Catholics and Protestants is entirely done away with and by section 179, where, in this case, a Catholic school district is supposed to cover the same territory as any Protestant school district, the said Catholic school district is not only wiped out, but its property and assets are vested in, and belong

to the other school district, which under the act becomes the public school district."

But it is said that the Catholics as a class are not prejudicially affected by this act. Does it not prejudicially, that is to say, injuriously, disadvantageously, which is the meaning of the word prejudicially, affect them when they are taxed to support schools of the benefit of which by their religious belief and the rules and principles of their church they cannot conscientiously avail themselves, and at the same time by compelling them to find means to support schools to which they can conscientiously send their children, or in the event of their not being able to find sufficient means to do both to be compelled to allow their children to go without either religious or secular instruction: in other words, I think the Catholics were directly prejudicially affected by the legislation, but whether directly or indirectly the local legislature was powerless to affect them prejudicially in the matter of denominational schools, which they certainly did by practically depriving them of their denominational schools and compelling them to support schools the benefit of which Protestants alone can enjoy.

In my opinion the Public School Act was *ultra vires*, and the by-laws of the City of Winnipeg, Nos. 480 and 483, should be quashed. This appeal should be allowed with costs.

STRONG, J., concurred.

PATTERSON, J.—The following affidavit was made in this case by Archbishop Taché:

"2. Prior to the passage of the Act of the Dominion of Canada passed in the thirty-third year of the reign of Her Majesty Queen Victoria, chapter three, known as the Manitoba Act and prior to the order-in-council issued in

pursuance thereof, there existed in the territory now constituting the the province of Manitoba a number of effective schools for children.

"3. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic church and others by various Protestant denominations.

"4. The means necessary for the support of the Roman Catholic Schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools and the rest was paid out of the funds of the church, contributed by its members.

"5. During the period referred to, Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic church supported the schools of their own church for the benefit of Roman Catholic children, and were not under obligation to and did not contribute to the support of any other schools.

"6. In the matter of education, therefore, during the period referred to, Roman Catholics were as a matter of custom and practice separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth.

"8. The church regards the schools provided for by "The Public Schools Act" and being chapter 38 of the statutes passed in the reign of Her Majesty Queen Victoria, in the fifty-third year of her reign, as unfit for the purpose of educating their children, and the children of Roman Catholic parents will not attend such schools. Rather than countenance such schools, Roman Catholics will revert to

the system of operation previous to the Manitoba Act, and will establish, support and maintain schools in accordance with their principles and faith as aforementioned.

"10. The effect of "The Public Schools Act" will be to establish public schools in every part of Manitoba where the population is sufficient for the purpose of schools and to supply in this manner, education to children free of charge to them or their parents further than their share, in common with other members of the community of the amounts levied under and by virtue of the provisions contained in the act.

"11. In case Roman Catholics revert to the system in operation previous to the Manitoba Act they will be brought in direct competition with the said public schools, owing to the fact that the public schools will be maintained at public expense, and the Roman Catholic schools by school fees and private subscription the latter will be labour under serious disadvantage. They will be unable to afford inducements and benefits to children to attend such schools equal to those afforded by public schools, although they would be perfectly able to compete with any or all schools unaided by law-enforced support."

The statute of Canada (33 Vic. ch. 3), which gave its constitution to the province of Manitoba declares in section 22 that, in and for the province of Manitoba, the legislature "may exclusively make laws in relation to education, subject and according to the following provisions:

(1) Nothing in any such law shall prejudicially effect any right or privilege with respect to denominational schools, which any class of persons have by law or practice at the union."

"Law" here evidently means statute law. The basis of the constitution given to the new province was the British North America act, 1867, (33 Vic. ch. 3, s. 2). It is declared that that act shall apply to the province,

excepting, amongst other things, such provisions as are varied by the Manitoba act.

Section 93 of the B. N. A. act, which dealt with the subject of provincial legislation respecting education, was not intended to be applied to Manitoba without some variations. It was therefore, re-written to form section 22 of the Manitoba act, the original language being adhered to whenever no variation of the provisions was intended. In this way I suppose it was that section 22 happened to refer to rights and privileges with respect to denominational schools which any class of persons had in the province by law, when there was no statute touching such schools that affected Manitoba. The reference in section 93 was to statutory rights and privileges existing in some of the provinces entering into the confederation. In section 22 it meant nothing. If that section, which is a transcript of section 93 with the interpolation of the words "or practice," had not introduced those words, it would have been inoperative for want of something to operate on. It is not an example of very precise or accurate drafting. The first question for us to decide is what the added words "or practice" mean, or whether they also mean nothing.

"Which any class of persons have by law or practice" —in grammatical effect "have by law or by practice."

What is meant by having *by practice?*

To have *by law* here means to have under some statutory provision, the preposition "by" pointing to the law or statute as the means or instrument by which the right or privilege was acquired. Are we obliged to understand the term "by practice" as intended to signify acquired by practice or user, involving some idea of prescription? It is arguable and has in effect been argued that that is the proper understanding of the term—that the word "by" must have the same force when understood in the one place as when expressed in the other, leading to the con-

clusion that, inasmuch as no rights or privileges in respect of denominational schools had been acquired in the territory in that manner, the clause in question is wholly inoperative.

The construction thus contended for may be capable of being supported by strict reasoning from rules of grammar or rhetoric, but it is not in my judgment appropriate to this clause. We have seen that precision and accuracy are not characteristics of the clause as a whole, and we cannot properly single out these particular words "by practice" for very critical and pedantic treatment.

We must credit the legislature with having intended that these words, which were added to those taken from section 93, should have some effect. I take the meaning of the clause to be that rights and privileges in respect of denominational schools existing by statute, if any such there had been, and rights actually exercised in practice at the time of the union, were not to be prejudicially affected by provincial legislation.

These were denominational schools maintained by different classes of persons, some by the Roman Catholic church, others by Protestants. The right to establish and maintain such schools was not derived from statutory law. Is was incident to the freedom of British subjects, and was independent of, and anterior to legislation. The Manitoba act did not assume to preserve that right merely as an abstract and theoretical right, but it did so in favour of such classes of persons as at the union were practically exercising it. If this construction seems to do any violence to the language of the clause, is is only by treating the word "by," where it is understood before the word "practice," as not having precisely the same force as when expressed before the word "law." But, as once remarked by one of the most eminent of English judges, Lord Stowell, when Sir W. Scott, "Courts are not bound to a strictness at once

harsh and pedantic in the application of statutes." *The Reward*, 2 Dod's Adm. Rep. 269.

Dicta to the same effect, as well as examples of their application, abound in the books. Thus in a recent case, *Salmon* v. *Duncombe*, L. R. 11, App. Cas. 627, we find it laid down in the judgment of the Judicial Committee, that where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.

"The more literal construction of a statute" said Lord Selborne in *Caledonian Railway Company* v. *North British Railway Company*, L. R. 6 App. Cas. 114, "ought not to prevail if it is opposed to the intentions of the legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

In my opinion the Roman Catholics are a class of persons who had within the meaning of the statute, rights and privileges with respect to denominational schools in the Province of Manitoba at the union.

The rights and privileges preserved by the statute were only those peculiar to the schools as denominational schools, or which gave the schools that character. Chiefly they were the education of their children under the control and direction of the church, and the maintenance of their schools for that purpose.

A point is made in the affidavit on which these proceedings are founded upon the fact that the schools of the Roman Catholic church were maintained by the Catholics by contributions in some form, as fees for tuition or as contributions to the general funds of the church, or possibly, though we are not told that it was so, as subscriptions for school purposes, and the schools of the Protestants

were maintained by Protestants, neither body contributing, or being liable to contribute to maintain the schools of the other. The fact is not without importance from a point of view which I shall presently notice, but I am not prepared to hold that the immunity enjoyed from liability to support schools of another denomination, at a time when taxation for school purposes was unknown in the territory, was a privilege in respect of denominational schools.

The provincial statute of 1890, which is attacked as *ultra vires*, renders every tax payer liable to assessment for the support of the public schools. These schools are not denominational, and they are objectionable to the Roman Catholic church, which insists upon the supervision of the education of the children of its members. The effect of the new statute and the grounds of objection to it are explained in the affidavit of Archbishop Taché. I refer particularly to paragraphs 8, 10 and 11. Rather than countenance the public schools, he tells us in the 8th paragraph, Roman Catholics will revert to the system of operation previous to the Manitoba act, and will establish, support and maintain schools in accordance with their principles and faith. In other words, they will assert and act upon the privilege or right in respect of denominational schools which, as I construe section 22, they had as a class at the union.

It is thus in effect asserted on the part of the appellant that the right or privilege has not been destroyed by the Public Schools Act of 1890. The same assertion is made on the part of the respondents, who make it one of their grounds in support of the by-laws which are attacked, or rather in support of the provincial statute. But the right or privilege may continue to exist and yet be injuriously affected. It is not the cancelling or annulling of the right that is forbidden. The question is, does the statute of

1890 injuriously affect the right? That it does so appears to me free from serious doubt.

In one form or other the members of the church supported the schools of the church. As a class of people they bore the burden. We are not concerned to inquire how the burden was distributed among the individual members, or whether each one bore some part of it. The privilege in question appertained to the class of people, and the burden was borne by the class. The bearing of the burden was essential to the enjoyment of the privilege. It is the maintenance of a school that is of value to the community or class, rather than the abstract or theoretical right to maintain it. In other words the value of the right depends upon the practical use that can be made of it. Whatever throws an obstacle in the way of that practical use prejudicially affects the right. It is not conceivable that in any community, and notably among the settlers in a region like Manitoba, a burden of taxation for the support of public schools can be imposed on the people of any religious denomination without rendering it less easy for the same people to maintain denominational schools. The degree of interference is immaterial. If it occurs to any extent the right to maintain the denominational school is injuriously affected.

It has been objected that the argument against the public school tax on the ground of its making the people less able to support their denominational schools, involves the denial of the right to impose ordinary municipal taxes, because those taxes also absorb their share of the means of the taxpayers. The objection is aside from the issue. The provision of the statute relates only to legislation respecting education and the restriction is upon the power to make laws on that subject.

It is not, however, merely a question of pecuniary ability to do one's share in supporting a denominational

school in addition to paying the public school tax. Assuming the ability in the case of every individual belonging to the denomination, which is an extravagant assumption, we must remember that the one payment is compulsory and the other voluntary. When a man has under compulsion paid his money for the support of the public school, it is natural that he should be less willing to avail himself of the privilege of paying for the support of the other, though his right to pay, as well as his ability, remain. The contest is over the right or privilege not of the individual, but of the class of persons.

We are familiar with the expression "injuriously affected" as used in the compensation clauses of the railway acts and in the English Land Clauses Act. It would be labour lost to cite cases turning upon the application of the provisions for compensating persons whose lands are injuriously affected by works done under sanction of law. They are very numerous, and the English cases will be found collected in Cripps on Compensation, chap 9, and several other treatises. The claim to compensation failed in many of the cases in which lands were injuriously affected, for reasons arising on the statutes under which the claim was made, as, *e. g.*, because the injury was caused by an act that would not have given a right of action at common law, or because it was caused by the operation only and not by the construction of the work; but all the cases agree in recognizing as something that injuriously affects a man's property whatever interferes with his convenience in the enjoyment of it, or of any right in respect of it, or prevents him from enjoying it to the best advantage, and whether the injury happens to be permanent or only temporary. The same principle makes it imperative to hold that the right of a class of persons with respect to denominational schools is injuriously affected if the affect of a law passed on the subject of education is to render it more difficult or

less convenient to exercise the right to the best advantage. I mean the direct effect of the law, and I regard the prejudice to the denominational school, which is worked by making those to whom it looks for support pay the school tax as a direct effect of the statute. There may be indirect results by which the denominational school may suffer in its prestige or prosperity yet which cannot be taken to bring the statute under the censure of section 22. One of these, viz., the competition of the public schools is alluded to in the eleventh paragraph of his Grace the Archbishop's affidavit. I am not quite sure that I fully understand that paragraph. I am not sure whether the objection it indicates extends to the establishment of any schools at the public expense, or only to the assessment of Roman Catholics for the support of public schools. I shall, therefore, merely say that, according to my present opinion, a public school may, by reason of superior equipment or of other advantages, compete with a denominational school, to the disadvantage of the latter without thereby affording just cause for complaint.

Upon the grounds which I have thus discussed I am of the opinion that the act of 1890 transgresses the limits of the power given by the 22nd section of the Manitoba Act, and that the assessment which the appellant is resisting is illegal.

It may not be out of place to remark, though it is scarcely necessary to do so, that there is no general prohibition of legislation which shall affect denominational schools. The prohibition relates only to the rights and privileges of classes of persons and to legislation which injuriously affects such rights. There is, therefore, room for legislative regulations on many subjects, as for example compulsory attendance of scholars, the sanitary condition of schoolhouses, the imposition and collection of rates for the support of denominational schools, and sundry other

matters, which may be dealt with without interfering with the denominational characteristics of the school, and which I suppose were dealt with in the Statutes of the Province that were repealed in 1890 to make way for the system now complained of.

I am of opinion that the appeal should be allowed and the by-laws of the City of Winnipeg, Nos. 480 and 483, quashed, the appellant having his costs of the appeal and also of all proceedings in the courts below.

FOURNIER and TASCHEREAU, J J., delivered judgments in French, quashing the by-laws with costs. ‡

NOTE.

On the 16th instant judgments were given by the Supreme Court in the two following Manitoba cases:

BERNARDINE v. NORTH DUFFERIN.

The appeal taken by the plaintiff from the Full Court of Queen's Bench was allowed with costs.

STEPHENS v. McARTHUR.

[Vol. 1, pp. 19-21, and 72-74.]

The appeal taken by the plaintiff from the Full Court of Queen's Bench was allowed with costs.

‡ According to latest advices from Ottawa before going to press these judgments had not yet been handed to the reporters.

On the 17th instant judgments were given in the four following Manitoba cases :

ASHDOWN v. FREE PRESS.

[Vol. 1, pp. 102-103.]

The appeal taken by the plaintiff from the Full Court of Queen's Bench was dismissed with costs.

RE LISGAR ELECTION PETITION.

[Vol. 2, pp. 45-6.]

The appeal taken by the petitioner from the Full Court of Queen's Bench was dismissed with costs.

RYAN v. WHELAN.

[Vol. 1, pp. 30-31 and 104-106.]

The appeal taken by defendant from the Full Court of Queen's Bench was dismissed with costs.

LONDON & CAN. L. & A. CO. v. MUNICIPALITY OF MORRIS.

[Vol. 1, pp. 176-7, and 215-6.]

The appeal taken by the defendants from the Full Court of Queen's Bench was dismissed with costs..

[Reports of the above judgments will be given later.—Ed.]

THE

WESTERN LAW TIMES REPORTS.

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

MANITOBA.

IN THE QUEEN'S BENCH.

FREEHOLD L. & S. CO. v. McLEAN.

NOVEMBER 10, 1891.] [BAIN, J.

Mortgage—Rate of interest after due date of principal—"Until the whole is fully paid and satisfied."

Bill to foreclose mortgage. The proviso for redemption was as follows:

Provided this mortgage to be void on payment at the office of the company, in the City of Toronto, of $4200, in gold coin, if so demanded, the said principal sum of $4200 to become due and payable at the expiration of five years from the date hereof, together with interest thereon at the rate aforesaid half-yearly on the 21st days of April and October in each and every year until the whole is fully paid and satisfied. The first instalment of interest to become due and payable on the 21st day of April, 1883, together with taxes and performance of statute labour.

The rate of interest reserved was nine per cent., and the mortgage became due and payable on October 21, 1887.

In taking the accounts the Master allowed interest on the principal money from the due date until the date of the report at the above rate. Evidence was given before the Master to show that the amount of money secured by the mortgage could not have been borrowed on the security for a lower rate.

Bradshaw for the defendant appealed on the ground that no higher rate than six per cent could be allowed after the mortgage became due.

Mulock, Q.C., in reply.

Held—

1. There was nothing in the mortgage shewing that it was the intention of the parties that the mortgagee should be liable to pay interest at the rate reserved after the day fixed for the payment of the principal. The clause preceding the proviso that the mortgage is to be a security for the repayment of $4200 and interest at 9 per cent, must be read with the proviso, and such proviso that interest on the principal at the rate specified is to be paid half-yearly "until the whole is fully paid and satisfied" cannot mean anything more than "until the principal is paid." The words "until paid" have been held to cover payment of interest only until the day fixed for payment of the principal, and not such interest after that day in the event of the principal not being then paid, following *St. John* v. *Rykert*, 10 S. C., 278; *Powell* v. *Peck*, 15 Ont. App. 138; and *Peoples Loan Co.* v. *Grant*, 18 S. C., 262.

2. The mortgagees were entitled to damages for the non-payment of the principal, but the only damages that could be allowed for the non-payment of money would be interest, which would come within the provisions of R. S. C., cap. 127, s. 2,* and interest since due date of payment

*Sec. 2. Whenever interest is payable by agreement of the parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be six per cent. per annum.

of principal should consequently be allowed at the rate of six per cent.

NEWMAN v. LYONS.

NOVEMBER 20, 1891.] [DUBUC, J.

Interpleader—Preferential judgment—Fraudulent conveyances—Right of subsequent creditors to set same aside.

Interpleader issue to determine priority of writs of *fi. fa.* of execution creditors.

W. J. Cooper for plaintiff.

Howell, Q.C., and *D. A. Macdonald* for defendant.

The judgment debtor was sued by his wife three days after being sued by Newman, but did nothing in the matter. An appearance was entered for him by an attorney, through the instrumentality of his wife's attorney. The debtor gave no instructions for the appearance to be entered, and stated that it was entered without his knowledge, but that if it was done to secure his wife's claim he had no objection.

Held—

That though there was no doubt that this was a contrivance to procure judgment to be signed in favour of his wife before the other creditors could obtain their judgments, yet as the proceedings appear to have been regular, such judgment could not be declared void unless it was shown that there was no real debt due at the time.

The debtor by a series of conveyances between himself and other members of his family had disposed of certain of his properties in a manner which the learned judge found was a series of contrivances to put them out of the reach of his creditors. It appeared that about the time or shortly after the last loan of money was made by Mrs. Lyons (the defendant in this issue) from part of the proceeds of such properties which then stood in her name, all the debts due

by William Lyons had been before, or were then paid, and the judgments standing against him were satisfied. The plaintiff's debt was contracted subsequently.

Held—

That even if the conveyances and transactions by which William Lyons transferred part of his property to his wife might have been considered void as against his creditors at the time, as savouring of fraudulent contrivances, now that the claims of such creditors had been paid and satisfied, they could not be deemed fraudulent as against subsequent creditors whose claims did not exist at the time, and such subsequent creditors could not attack such conveyances, which, as between Lyons and his wife, and against the rest of the world, were lawful.

Verdict for defendant.

THE PATTERSON & BRO. CO. (LD.) v. DELORME.

NOVEMBER 21, 1891.] [BAIN, J.

Contract—Damages for breach—Non-acceptance of offer—Reasonable time for.

Appeal from County Court of Selkirk.

Damages for breach of contract. Claim indorsed on the writ was as follows:

"The plaintiffs sue the defendant for breach by the defendant of the agreement, a copy of which is annexed; said breach consisting in not accepting the binder and in not giving the plaintiffs promissory notes therefor, as mentioned in said agreement: the plaintiffs having been always ready and willing to carry out the agreement on their part."

The important paragraphs of this agreement were as follows:

Winnipeg, October 10th, 1889.

To The Patterson & Bro. Co. (Ld.)

Please supply me with one of your Patterson binders and ship the same to me about the first day of August 1890, to C. P. R. station, for for which I agree to pay you the sum of $190 on delivery at Winnipeg, I paying expense of carriage from that place as follows: cash $....., and a note satisfactory to you and payable at your office in Winnipeg for $100

due on the first day of January 1891, ditto, $90 due on the first day of January 1892, with interest etc., and should you be unable for any reason to fill this order I will not hold you responsible.

It then went on to provide that the title should remain in the company till the binder was paid for in full and that "this order is not binding on the Patterson & Bro. Co. (Ltd.) until received and ratified by them at Winnipeg."

The plaintiffs accepted the order in October but the defendant was not notified that they had so accepted or ratified it, and the only communication that he received from the plaintiffs was a letter in the latter part of August 1890 after his harvest was cut, stating that the binder was held ready for him; before he received this letter the defendant had bought another binder and did not take the plaintiffs' binder from them, or give the notes mentioned in the order. The damages claimed were the amount of the two notes mentioned in the order.

The county judge entered a verdict in favour of the defendant.

Cameron for the plaintiffs, appealed.

Pitblado in reply.

Held—

1. The order must be regarded as only a notice or proposal from the defendant to purchase the binder, and that until the plaintiffs accepted his offer, and in some way or other communicated their acceptance to him, there was no contract or agreement between the parties; the plaintiffs accepted the order but their acceptance was never formerly communicated to the defendant.

2. Though the defendant's order did not fix any time within which it was to be accepted or refused, yet the proposal must be taken to have been open for acceptance for a reasonable time, and an acceptance in August 1890 of an offer to purchase made in October 1889, was not an accept-

ance within a reasonable time. *Hebbs Case*, L. R. 4 Eq. 9, and cases cited in Benjamin on Sales, page 40.

3. It was not necessary for the defendant under the circumstances to notify the plaintiffs that he withdrew his order, for the order having been given and not having been withdrawn by the defendant, it remained open for the plaintiffs acceptance for a reasonable time, which time having expired, the defendant was entitled to assume that the plaintiffs did not intend to accept the order. *Ramsgate Hotel Co.* v. *Goldsmid*, L. R. 1 Ex. 109.

Verdict of the court below sustained. Appeal dismissed with costs.

PRACTICE.

YOUNG v. LENG *et al.*

OCTOBER 22, 1891.] [IN CHAMBERS—KILLAM J.

Examination of foreigner, temporarily within jurisdiction, on his pleas—Identity of parties—Admission of service by attorney.

Appeal from an order of the Referee. It appeared from the material before the Referee that an order for the examination of the defendant had been made on the 13th day of August 1891, and that on the same day a copy of such order, and the appointment made in pursuance thereof for four o'clock of the fifteenth August 1891, had been served by a clerk of the plaintiff's attorney on a person whom he supposed to be the defendant Whitton, but whom, as appeared from his examination on his affidavit, he did not know personally, and had never seen before. It also appeared that the person served with the order and

appointment, had been shown the original order and appointment and had been tendered $1.25 conduct money, which he refused to accept. The only evidence of service of the order and appointment on the defendant's attorney was an admission of service by a firm of attorneys on the back of the order—"service admitted on date." It was objected by the defendant's counsel that (*a*) the material before the court did not show the state of the cause and that for anything that appeared judgment might have been signed against the other defendant, in which case the defendant whose defence was now sought to be struck out would be excused from attending for examination; (*b*) there was no evidence of service of a copy of the order and appointment on the defendant's attorney the required 48 hours before the time at which the examination was to be held, as the effect of such admission of service was only to show that they were served before 7 o'clock of the 13th August; (*c*) that there was not sufficient evidence that the person served with the order and appointment was the defendant; and (*d*) that sufficient conduct money had not been tendered to the said defendant. The Referee overruled all the objections and made an order directing defendant Whitton to attend for examination at his own expense.

Bradshaw, for Whitton, appealed.

Hough in reply.

Held—

The appeal should be sustained with costs. Order of Referee discharged.

RE LAKE WINNIPEG TRANS. ETC. CO. (LTD.)

NOVEMBER 19, 1891.] [TAYLOR, C. J.

Winding Up Act—What costs taxable to creditors' representative.

An order was made some time ago in this matter under rule 59 appointing certain creditors to represent the credi-

tors in and about the proceedings relating to the winding up. This rule is the same as the English rule 61, except that that rule says the person so appointed is to represent the creditors "at the expense of the company," while rule 59 says, "at the expense of the company, or otherwise as shall seem proper." By the order made herein the question of costs was reserved.

Darby, for the representative creditors, stated that while they were ready to bear any costs incurred by the appearance of counsel or of a solicitor on their behalf or in connection with matters which affected their interests, yet they were not willing to incur personal liability for costs on behalf of the general interests of the creditors as a body.

Mathers for the liquidator.

Judgment—

"While it may be that the costs of an attendance by the creditors' representative should not be allowed in every matter which comes up, I think he should be liberally dealt with, and his costs should be allowed whenever it is not undoubtedly an unnecessary attendance.

Having one person to represent the body of creditors, whose costs are paid out of the estate, must be a great saving of expense to the individual creditors, and rendering the employment of a solicitor or counsel by each of them unnecessary. The court too has the benefit, by such representative, of learning the views of the creditors and not merely those of the liquidator. I do not see, however, that an order can be made to allow costs of an attendance of the creditors' representative on every occasion of a matter being brought before the court. The solicitor acting for the representatives must exercise a discretion as to the matters upon which he will attend, and where costs should be allowed it will be well for the judge to note that at the time, so that difficulties may not afterwards arise on taxation.

In this matter the only attendances of the creditors' representatives since their appointment have been in connection with the question whether the liquidator should call for an assignment and delivery of the securities held by encumbrancers on the steamer *Aurora*, and the costs of these should be allowed."

The learned Chief Justice reviewed, *inter alia*, the following cases: *Aston's Case*, 4 D. & J., 320; *Hyam's Case*, 1 D. F. & J., 75; *Re Saxon Life Assce. Soc.*, 2 J. & H., 408; *Ex parte Budd*, 31 L. J. Ch., 4; *Ex parte Cotterell*, 32 L. J. Ch., 66; *Ex parte Anchor Insce. Co.*, 32 L. J. Ch., 215; *Re Brit. Prov. Life*, 32 L. J. Ch., 633; *Re Overend, Gurney & Co.*, L. R. 3, Eq. 634; *McIver's Claim*, L. R. 5, Chan. 424; and *Re Adasonian Fibre Co.*, L. R. 9, Ch. 637.

RE GOTT, HOWELL v. GOTT.

NOVEMBER 24, 1891.] [TAYLOR, C. J.

Intestacy—Administration order—Form of—Publication of and general proceedings on—Master's inquiry.

Motion for an administration order.

Joseph Addison Gott, farmer in the Municipality of Springfield, died in March, 1889, having no known relatives, and living alone, and supposedly unmarried. Among his papers a will was found dated February 4, 1873, but there was nothing in it to show where he lived when it was executed, or who the two witnesses were. It dealt solely with three matters; a sum of £700 insurance on his life, moneys in the hands of his brother Thomas, and any money or personal property which may, at the time of his death, be in the possession of his sister, Mrs. Sisson; it contained no general clause dealing with the residue, and no executor was named. He left in this Province a farm, some horses, cattle and household effects. As it was necessary that the estate should be at once cared for, temporary administration with the will annexed was

granted to the plaintiff. As the result of subsequent inquiries it transpired that one Sherer claimed that the deceased had married his daughter, in June, 1885, who was still living and by whom deceased left one child. The sister, Mrs. Sisson, thereupon alleged that the marriage was void, because the deceased was at that time already married having a wife then alive in India. Sherer claimed that such alleged marriage was no marriage as the woman was already a married woman. A brother of the deceased, about a year and a half after his death, wrote to the plaintiff that he had heard, since his brother's death, from a sister of this alleged wife in India, that such woman was an inmate of an asylum at Bombay, though her sister had not heard from her for some time.

Howell, Q. C., for plaintiff, temporary administrator.

Phippen for defendant, *née* Sherer, and child, the claimants.

Judgment—

. . . . There can, I think, be no doubt that as to property in Manitoba, and which has come to the hands of the plaintiff the deceased died intestate. To the estate there may be several sets of claimants. If the marriage in Inda was a valid one, then, if the marriage in England is proved, the woman then married, who has been made the defendant on this motion, and her child are entitled. If the marriage in India was a valid one, but the woman then married had died, without having had any child or children, before 15th June 1885, the defendant and the child will equally be entitled. If the marriage in India was a valid one, even though the woman then married died before 15th June 1885, if she left any child or children alive, or any of whose descendants were alive, in March 1889, they will be entitled to share with the defendant and her child. If the marriage in India was a valid one, and the woman then married was alive on 15th June, 1885, but

died before the deceased, then, if she left any child or children, they or their descendants will be entitled to the estate. If she, the marriage in India being valid, married the testator, she, or if since dead, the representatives, will be entitled to a share of the estate, and any child or children, or their representatives, to the remainder, or, if no such child or children, then the brothers and sister of the deceased. Again, if the marriage in India being valid, the woman then married was alive in June 1885, but died before March 1889, leaving no child or children, nor the representative of such child or children, the brothers and sister are entitled. Perhaps even other contingencies might be suggested. Plainly the inquiries the master may have to make, and the facts he may have to consider, will not be without their difficulties. I do not think, however, that any special directions in the order will be required, beyond a direction that he is to inquire and ascertain who is or are entitled to the estate of the deceased, or next of kin, or otherwise, under the Statute of Distributions. The general orders of the court seem to provide for everything else, and where they do I am always unwilling to insert special directions in a decree or order.

General order 36, rule 6, provides for an executor or administrator obtaining an order for administration against one only of the persons entitled, but by G. O. 38, the persons who would be necessary parties are to be served with with a copy of the order made in the specified manner. But by G. O. 217, the master may dispense with that G. O. 38, stating his reasons for doing so, and by G. O. 216, he may advertise for heirs or next of kin. Mr. *Phippen* appears for the defendant, and the master should appoint him as guardian to the child, there is no need to appoint a special guardian *ad litem*, as for the purposes of the inquiries the master is to make, the interests of the defendant and her child are identical. There should be an advertise-

ment published in Madras, where relatives of the alleged Indian wife seem to reside, and the authorities of the asylum at Bombay, of which she is said to have been, and perhaps may still be an inmate, should be in some way communicated with.

The estate is not a large one, and I am unwilling that unnecessary expense should be incurred, but although further directions need not be reserved, under the very peculiar circumstances of this case, the master should only find who are entitled and in what shares, liberty to apply in Chambers being reserved. The case is one in which the power given by G. O. 213, to report special circumstances will no doubt be useful.

On the motion both parties insisted that the order should direct a sale of the farm at once and pending the making of inquiries by the master. I doubt however if that can be ordered. The plaintiff has only temporary administration and it is by no means clear that the land came to his hands under the Real Property Act. If it did not, where is the title to the land now? It seems to me that the utmost which can be done now is to reserve leave to apply for a sale of the land at some future time.

RUTHERFORD v. DAVISON.

NOVEMBER 30, 1891.] [THE REFEREE.

Next friend—Substitution of person of substance—Staying proceedings till security for costs be given.

The plaintiff, a married woman, filed a bill by her next friend, J. C. MacNabb.

Crawford for defendant moved, on material showing that the then next friend, J. C. MacNabb, was not a person of substance, for an order directing that all proceedings should be stayed until a new next friend, being a person of substance, should be appointed instead of MacNabb, or until the plaintiff, or MacNabb, should give security for

defendant's costs of suit; and that the plaintiff and her next friend should be liable for all costs incurred up to the present time; citing *Hind* v. *Whitmore*, 4 W. R., 379; *Macann* v. *Borradaile*, 16 W. R., 175; *Re Thompson*, 38 Ch. D., 317; *Stovel* v. *Coles*, 3 Chy. Ch. 421.

O'Reilly in reply.

Held—

The order should be made with costs.

[On appeal to a judge in chambers the Referee's decision was affirmed on December 10, with costs. ED.]

RE LAKE WINNIPEG TRANS. CO. (LD.) BERGMAN'S CLAIM.

NOVEMBER 30, 1891.] [TAYLOR, C. J.

Winding up Act—Amendment of claim—Maritime lien—Existence of in inland waters discussed.

Application under Winding Up Act by claimant for leave to withdraw his claim already filed, and to file another making mention of a security which he has, an alleged maritime lien on the steamer *Aurora* for wages due him as master thereof, valuing that security; and also for leave to proceed *in rem* in the Exchequer Court to enforce the lien he claims to have.

Wade for claimant.

Mathers for liquidator opposed both applications.

Held,—

The claimant should have leave to withdraw his claim and file an amended one if so advised; *Ex parte Whitton*, 43 L. T. N. S., 480.

Though section 62 of the Act is in the imperative form and says that a creditor holding security "shall specify the nature and amount" thereof, etc., yet rule 71 provides that the general practice of the court on its equity side is to

apply to all proceedings, which includes a power of amendment, and where, as here, the claim was put in by the creditor without professional advice, it would be harsh to refuse an amendment and so perhaps deprive the creditor of a lien he may have because of his omission to mention it when filing his claim.

As to the part of the application asking leave to proceed *in rem* in the Exchequer, the learned judge remarked that it had hitherto been assumed that the claimant had a maritime lien on the *Aurora*, but that apparently the Merchant Shipping Act 1854, 17 and 18 V., c. 104, s. 91, applied only to vessels proceeding to sea, and not to vessels navigating exclusively the inland waters of Canada; reviewing *Scott* v. *Carveth*, 20 U. C. R., 430; *Wilkins* v. *Carmichael*, 1 Doug, 101; *Smith* v. *Plummer*, 1 B. and Ald., 575; *Land* v. *Malden*, 5 U. C. R., 309; *Ellis* v. *Midland Rail. Co.*, 7 Ont. App., 464; and R. S. C., c. 72, and cap. 75, secs. 30-35.

Application stands for further argument as to this point.

SPARHAM v. CARLEY.

DECEMBER 1, 1891.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Notice of Motion—Short notice "by leave of the Court"—Amendment—Re-instatement of case on list of appeals—Inadvertence—Power of Court to to rescind rule.

An appeal had been entered on behalf of defendant from the judgment of Bain, J., allowing plaintiff's demurrer to defendant's eleventh plea.

On the appeal coming on for argument

Bradshaw, for plaintiff, objected that there was no evidence before the court of a rule on demurrer having been taken out, and that consequently the appeal was improperly entered.

The Court gave effect to the objection and the appeal was dismissed with costs.

Elliott, for defendant, subsequently on the same day applied to the Court for leave to make a motion on the following day to re-instate the cause, and upon such leave being granted, served a notice of motion to re-instate the cause, the material part of which was as follows:

"Take notice that by leave of this Honourable Court in banc, this day given the defendant will apply to said Court on Tuesday the first day of December instant at the hour of eleven o'clock in the forenoon . . . to re-instate etc."

On the motion coming on

Bradshaw objected that (1) by rule of court 82, the practice in equity should prevail on this motion, and by rule 106 "there must be at least two clear days between the service of a notice of motion . . . . and the day named in the notice for hearing, unless the court or a judge shall give special leave to the contrary," and it did not appear that leave to serve short notice had been given, citing *Hart* v. *Talk*, 6 Hare 611; *Harris* v. *Lewis*, 8 Jurist 1063; *Chambers* v. *Toynbee*, 12 W. R. 1100; *Dawson* v. *Beeson*, 22 Ch. Div. 504; and *McMicken* v. *Ontario Bank*, 1 W. L. T. 249; (2) the rule having been taken out the defendants motion should have been to rescind the rule; and (3) as the notice of motion did not give notice of reading any material none could be read, and there was nothing before the Court on which it could act.

Elliott in reply.

Held—

1. It sufficiently appeared from the notice of motion that leave to serve short notice had been given.

2. The notice of motion should be amended so as to ask that the rule dismissing the appeal should be rescinded.

3. The motion be allowed to stand over till the following day with liberty to the defendant to file such affidavits, or other material, as he might be advised in support of the motion.

No costs to either party.

DECEMBER 2, 1891.]

The defendant having amended the notice of motion and filed material in support thereof, the motion to re-instate came on for argument.

Bradshaw objected that the rule dismissing the appeal could not be rescinded, because a rule could not be rescinded except in cases where the court had no jurisdiction to make the rule, or unless it had been improperly drawn up, so as not to be in accordance with the judgment of the cout, and the fact that the court had given an erroneous judgment was no ground for rescinding the rule.

Elliott in reply cited *Shaw* v. *Nickerson*, 7 U. C. Q. B. 541; *Tucker* v. *Young*, M. R., Temp. Wood 187, Lush 943, Archbold 1592; *Jarvis* v. *Burns*, 16 N. B. 327; *Day* v. *Vinson*, 9 L. T. N. S. 654; *Fowler* v. *Lloyd*, 6 Ch. D. 299; and *McMonagle* v. *Orton*, 6 M. R. 356.

Held—

The court having struck out the appeal under a misapprehension, the rule which has been issued through inadvertence dismissing it, may be rescinded as having been issued through inadvertence. The argument of the demurrer before a single judge, was a proceeding in court, the demurrer book was in court, that bearing the judges endorsation of the demurrer being allowed, and the entry in the clerk's book, which is a record of the court, furnish sufficient material to warrant the court in hearing the appeal. It is quite different where an order of a judge made in chambers is moved against, for there it is necessary

to bring into court from chambers the proceedings there, properly verified, and to verify a copy of the order which which was made.

EXCHEQUER COURT OF CANADA.

REGINA v. THOMAS.

JANUARY 19, 1891.] [BURBIDGE, J.

Cancellation of a land patent—33 Vic., c. 52, s. 1—Improvidence in granting patent—Indian gratuity, effect of half-breed sharing in—Manitoba act title.

See *ante*, vol. 1, pp. 222-3, for a prior note of this case.

The following is the full text of the

Judgment—

This information is brought to annul letters patent issued on the 27th of October, 1887, in favor of the defendant, for lot numbered 22 in the parish of Saint Peter and Province of Manitoba.

The ground, upon which the cancellation of the patent is sought, is, briefly, that the defendant is not, as at the time when it was issued he was supposed to be, entitled to the lot in question under *The Manitoba Act* and its amendments, 33 Vic., c. 3, secs. 32, 33 and 34, and 38 Vic., c. 52, s. 1, and that, therefore, it was issued through error and improvidence within the meaning of the 57th section of the Revised Statutes, Chapter 54.

It is admitted that the defendant is a half-breed, and it appears from the evidence that he has during all his life lived after the manner of white men, and never according to the modes and habits of life of the Indian. He is by

trade and occupation a carpenter and farmer. For many years he was a warden of the Church at Saint Peter, and on several occasions he has been a representative from that Church to the Synod. After the transfer of Rupert's Land and the North-West Territory to Canada, and before the Treaty to which reference will be made, he was appointed a justice of the peace.

It is also clear that since the year 1864, when for the sum of seventy-five dollars he purchased the lot in question from one Robert Sandison, he has been in undisturbed occupancy thereof, and that on the 15th of July, 1870, the date of the transfer, he was in actual peaceable possession of the same. This is not denied, but it is said that by participating in the gratuity given to certain Chippewa and Swampy Cree Indians in 1871, under a Treaty made with them at Lower Fort Garry on the 3rd of August of that year, and in the annuities payable thereunder the defendant lost his status as a half-breed, and forfeited his right to the lot and letters patent in question.

The defendant admits that in 1871, 1872, 1873 and 1874 he received for himself, his wife and two daughters, the annuity of three dollars for each person payable under the Treaty, and it appears he shared in the gratuity given when the Treaty was concluded. He says, however, that before taking any money under the Treaty he asked Mr. Simpson, the commissioner acting for Her Majesty, if, by taking the same, he would interfere with his private property, and that Mr. Simpson told him he would not, and that when in 1874, he learned for the first time that by the acceptance of such annuities he would deprive himself of his rights as a half-breed, he returned the amount paid to him in that year, and that since he has not taken any money under the Treaty and that the Crown has recognized his rights as a half-breed by the issue to him in October, 1876, of half-breed scrip.

The enquiry is, I think, somewhat narrowed by the fact that none of the Statutes of the Dominion relating to Indians and Indian affairs were in force in Manitoba prior to 1874, when by 37 Victoria, c. 21, certain provisions of 31 Victoria, c. 42, and of 32 and 33 Victoria, c. 6, were extended to that Province. It may be admitted that if in 1874, and thereafter, the defendant had participated in the annuities payable under the Treaty, he would have brought himself under the definition of an Indian contained in the Acts mentioned 31 Vic., c. 42, s. 15 and 37 Vic., c. 21, s. 8, and that he could not subsequently have regained his status as a half-breed except in accordance with the law or practice in that behalf for the time being in force.

The first question to be decided is: Did the defendant by participating in the gratuity and annuities mentioned make an election and renounce the status and personal condition of a half-breed and acquire that of an Indian? Unexplained his conduct would no doubt raise the presumption that he had done so. But looking at all the circumstances of the case it does not appear to me that such was at any time his intention. We have seen that he was careful before taking any money under the Treaty to enquire of the commissioner whether his acceptance would prejudice his position in respect of his private property, and that when in 1874 he realized the true state of the case he returned the annuity then lately paid to him, and that in 1876 his status as a half-breed head of a family was formally recognized by the Crown. It is said that Mr. Simpson could not bind the Crown by any such assurance as that alleged to have been given to the defendant. Possibly not, and yet it may be right and proper to weigh the defendant's acts in the light of such assurance. But take it that the defendant's status from the day he received his first payment under the Treaty until he returned the last must be deemed to be that of an Indian, the further question

presents itself: By virtue of what law did he forfeit his interest in the homestead that he had purchased and on which with his wife and family he was residing? The only answer suggested in reply to that enquiry is that such is the effect of the 19th section of *The Indian Act*, R. S. C. c. 43, whereby it is amongst other things provided that every Indian in the Province of Manitoba who has, previously to the selection of a reserve, possession of a plot of land included in or surrounded by a reserve, upon which he has made permanent improvements, shall have in respect thereof the same privileges as are enjoyed by an Indian who holds under a location title. But that provision was first enacted in 1876 by 39 Vic., c. 18, s. 10, and cannot, I think, be construed to deprive the defendant of any rights of property theretofore acquired, seeing that there is no pretence that he was at that time an Indian, or liable to be considered or treated as an Indian, within the meaning of the statute.

Mr. *Aikins* for the plaintiff, upon the authority of the cases cited, further contended that although the defendant might be found to be entitled to the letters patent issued to him, they should be set aside because the Minister of the Interior acted in ignorance of the fact that the defendant had not refunded the forty-eight dollars paid to him under the Treaty in the years 1871, 1872, and 1873. It seems that this fact was not, as it should have been, brought to the attention of the Minister either in 1876, when half-breed scrip was issued in favor of defendant, or in 1887, when his claim to Lot 22 was disposed of. This issue is not however raised by the pleadings, and it is not necessary to decide it, or to consider how far the earlier cases referred to have been modified by *Fonseca* v. *The Attorney-General* 17 S. C. R. 612, in which the 57th section of The Revised Statutes, chapter 54, has been so recently and fully con-

sidered. On the issues presented by the pleadings the defendant is, I think, entitled to succeed.

The information is dismissed with costs.

IN THE SUPREME COURT OF CANADA.

STEPHENS v. McARTHUR.

NOVEMBER 16, 1891.] { SIR W. J. RITCHIE, C.J. STRONG, J. GWYNNE, J. PATTERSON, J. FOURNIER, J.

Chattel mortgage—Fradulent preference—"Effect of preference"—49 Vic., cap. 45, sec. 2—Constitutionality of that act.

Vide vol. 1, pp. 17-21, and 72-74 for a report of this case before the Court of Queen's Bench for Manitoba from whose judgment the plaintiff appealed.

The following is a

PRECIS OF JUDGMENT.*

Per Curiam—Judgment delivered by Strong, J.

The principal ground upon which the security is impeached is that it was a preference, or had the effect of a preference within the meaning of the Manitiba Act 49 Vic. c. 45, sec. 2. There is no necessity of deciding the question of the constitutional validity of the statute, as the appeal may be decided on other grounds.

The appellant was an honest creditor and whether there was, or was not, notice to the appellant of the insolvency is not material. Both courts below have, however, found, as a matter of fact, that the appellant had not notice

*Kindly supplied to us by the Law Society of Manitoba, who have been unable to obtain the full text of the judgments, but were furnished this summary by a barrister present in the court during the delivery of judgment.

of the insolvency of the execution debtors at the time he took the security.

The substantial ground upon which this court relies is the construction of the language of the statute in relation to the meaning of the words "preference" and "effect of preference."

There is nothing to justify the conclusion that the word "preference" should have a wider scope, or alter, or interfere with the signification the word has in bankruptcy and insolvency statutes. It is for the respondent to show it has. *Butcher* v. *Stead*, L. R. 7, H. L. 839 referred to, and especially at p. 849. Also *Long* v. *Hancock*, 12 S. C. 539, and *Slater* v. *Oliver*, 7 Ont. 188.

The decisions of *Bank of Australia* v. *Harris*, 15 Moo. P. C. p. 116, and the Jamaica case of *Nunes* v. *Carter*, L. R. 1, P. C. 37, are precisely in point. Both these cases recognize that the word "preference" or "prefering" referred to a voluntary, and therefore fraudulent preference. See *Hannan* v. *Fisher*, in Tudor's L. C. on Mercantile Law, p. 818, ed. 1884.

In regard to what constitutes preference, the decided cases are equally explicit. See Tudor's L. C. on Mercantile Law, p. 818. It is argued that if there be no intent to prefer, yet the security given had "the effect of a preference;" it came within the meaning of those words in the statute. Mr. Justice Strong in the case of *Molson's Bank* v. *Halter*, 15 S. C. 88, has stated his opinion as to the meaning which ought to be placed on this expression, viz: the words applied to a case in which that had been done indirectly, which, if it had been done directly, would have been a preference within the statute, and therefore in his opinion is conclusive in the present case.

The court adopts arguments of appellant's counsel that if it is once demonstrated that the word preference means *ex vi termini* a voluntary preference, then the class of contracts, deeds, &c., which are to be avoided as having the

effect of a preference must also be restricted to such as are the spontaneous acts or deeds of the debtor, and reference is made to the case of *Bank of Australia* v. *Harris* (*ubi supra*) and also *Nunes* v. *Carter*, L. R. 1, P. C. 342.

Had it been the intention of the legislature to avoid all transactions which might result in giving precedence to active and diligent creditors who should by pressing their claims obtain priority, it would have enunciated it in clear and explicit terms.

No notice is taken of two other points made by appellant as to *locus standi* of the respondents, and that there was a further advance by the appellant at the time of taking his security. Both objections have weight but no opinion expressed as regards either of them.

Gwynne, J.—I cannot pronounce the judgment of the learned Judge who tried the case upon the question of fact as to the perfect honesty of the transaction assailed, and *bona fides* of the parties to it, to be clearly erroneous, and if I cannot, the established rule of this court is that I should not. In other respects I also entirely concur in the judgment of my brother Strong, to which I merely desire to add that in my judgment the case is concluded by the judgment of this court in *Molson's Bank* v. *Halter*.

PATTERSON, J., dissenting.—

Result of evidence is that the debtors, unable to pay their debts, but having hopes that if they could keep their creditors from interfering with their business they might be able to provide in the long run for paying them, transfer to one creditor all their assets having an understanding (vague) that he would assist them to keep their business going.

The mortgage has been held invalid as having the effect of giving a preference by the court below. Does not agree with the decision in *Molson's Bank* v. *Halter*, *supra*, but even if bound holds it is not applicable to the

Manitoba Statute. Reconsideration of the deision is permissible, *Re Hall*, 8 Ont. App. 135, and cases there cited; adopts the ordinary grammatical meaning of the word "preference." The words "fradulent preference" as used in connection with the administration of English bankruptcy law is not in our statute.

Refers to *Ex parte Tempest*, L. R. 6 Ch. 20; *Ex parte Topham*, L. R. 8 Ch. 614; *Butcher* v. *Stead*, L. R. 7 H. L. 389; do not bear upon the present discussion. Refers to *Brayley* v. *Ellis*, 9 Ont. App. 565-590, and cases there cited. Refers to *Ex parte Boyd*, 6 Morrell's Bk. Cas. 209, but contends the English bankruptcy system never was the law of Ontario or Manitoba.

Is also of opinion that the mortgage was made with intent to give the mortgagee a preference, although as it had "such effect" the statute dispenses with the necessity for inquiring into the intent. *Slater* v. *Badenach*, 10 S. C. 296. If the validity of the mortgage had to be tested under the act of 1885, he would without hesitation, hold it to have been made with intent to delay the creditors, other than the mortgagee, as well as with intent to give a preference.

As to constitutionality, retains his opinion expressed in *Edgar* v. *Central Bank*, 15 Ont. App. 202.

Appeal allowed, Patterson, J., dissenting, and judgment entered on the interpleader issue for the appellant with costs here and in court below.

CAN. PAC. RY. v MUN. OF CORNWALLIS.

NOVEMBER 18, 1891.]

The appeal of the defendants from the judgment of the Full Court of Queen's Bench for Manitoba (reported *ante* vol. 1, pp. 134-5, and 48-50) was unanimously dismissed with costs.

Stanford Law Library
3 6105 061 923 012